THE RECORD
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

AT THE Stated Meeting on October 20, resolutions in commemoration of Charles C. Burlingham were offered by Harrison Tweed, Lloyd K. Garrison and Edward S. Greenbaum. (The proceedings of the ceremony commemorating Mr. Burlingham will be published in the December Number of THE RECORD.)

The following resolutions, offered by the Committees on the Judiciary, City Court and Municipal Court, were adopted at the Stated Meeting:

The Committee on the Judiciary

1. COURT OF APPEALS

Resolved, that this Association find Judge Charles S. Desmond "Well Qualified and Approved" to hold the office of Chief Judge of the Court of Appeals of the State of New York.

2. SUPREME COURT, FIRST JUDICIAL DISTRICT (One Vacancy)

Resolved, that this Association find Justice Henry Clay Greenberg "Well Qualified and Approved" to hold the office of Justice of the Supreme Court of the State of New York.

3. COURT OF GENERAL SESSIONS (Two Vacancies)

a) *Resolved,* that this Association find James E. Mulcahy "Well Qualified and Approved" to hold the office of Judge of the Court of General Sessions of the County of New York.

b) *Resolved,* that this Association find Judge Samuel Riley Pierce "Well Qualified and Approved" to hold the office of Judge of the Court of General Sessions of the County of New York.

c) *Resolved,* that this Association find Justice Joseph A. Sarafite "Well Qualified and Approved" to hold the office of Judge of the Court of General Sessions of the County of New York.

The Committee on the City Court of the City of New York

1. NEW YORK COUNTY (Two Vacancies)

a) *Resolved,* that this Association find Amos S. Basel "Well Qualified and Approved" to hold the office of Justice of the City Court of the City of New York.

b) *Resolved,* that this Association find Leon Braun "Well Qualified and Approved" to hold the office of Justice of the City Court of the City of New York.

c) *Resolved,* that this Association find Harry Harris "Well Qualified and Approved" to hold the office of Justice of the City Court of the City of New York.

d) *Resolved,* that this Association find Justice John J. Quinn "Well Qualified and Approved" to hold the office of Justice of the City Court of the City of New York.

e) *Resolved,* that this Association find Justice Robert V. Santangelo "Well Qualified and Approved" to hold the office of Justice of the City Court of the City of New York.

f) *Resolved,* that this Association find Justice Darwin W. Telesford "Well Qualified and Approved" to hold the office of Justice of the City Court of the City of New York.

The Committee on the Municipal Court of the City of New York

1. THE BRONX, SECOND DISTRICT (One Vacancy)

a) *Resolved,* that this Association find Morris H. Linderman "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

b) *Resolved,* that this Association find Justice Mario A. Procaccino "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

2. BROOKLYN, THIRD DISTRICT (Two Vacancies)

a) *Resolved,* that this Association find Justice Abraham A. Berry "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

b) *Resolved,* that this Association find Justice Dominic S. Rinaldi "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

BROOKLYN, SEVENTH DISTRICT (Two Vacancies)

a) *Resolved,* that this Association find John A. Monteleone "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

b) *Resolved,* that this Association find John A. Valenti "Not Qualified" to hold the office of Justice of the Municipal Court.

BROOKLYN, EIGHTH DISTRICT (One Vacancy)

Resolved, that this Association find Justice Harold J. M. McLaughlin "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

3. MANHATTAN, FOURTH DISTRICT (One Vacancy)

a) *Resolved,* that this Association find Justice Thomas B. Galligan "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

b) *Resolved,* that this Association find William S. Shea "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

MANHATTAN, FIFTH DISTRICT (One Vacancy)

Resolved, that this Association find Justice Benjamin Shalleck "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

MANHATTAN, EIGHTH DISTRICT (One Vacancy)

Resolved, that this Association find Robert V. Sabatini "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

4. QUEENS, SIXTH DISTRICT (One Vacancy)

Resolved, that this Association find Justice David Leo Dugan "Well Qualified and Approved" to hold the office of Justice of the Municipal Court.

FORMER PRESIDENT Bethuel M. Webster has been appointed a member on the part of the United States of the Permanent Court of Arbitration. Harold Armstrong Smith of Chicago was also appointed. They replace Thomas K. Finletter and Adrian S. Fisher, whose terms have expired. The other two members representing the United States on the Court are David W. Peck and Herman Phleger.

The Permanent Court of Arbitration was established under The Hague Conventions for the Pacific Settlement of Interna-

tional Disputes of 1899 and 1907. The Permanent Court, which has its seat at The Hague, was organized "with the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy." Pursuant to the provisions of the two conventions each signatory power is directed to select four persons as arbitrators. The persons selected are inscribed as members of the Permanent Court in a list which is notified to all the contracting powers. It is further provided in the two conventions that when any contracting powers desire to have recourse to the Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the competent tribunal to decide the difference must be chosen from the general list of the members of the Court.

The members of the Permanent Court of Arbitration also carry out the function, pursuant to the Statute of the International Court of Justice, of making nominations of persons for election by the United Nations General Assembly and the Security Council as members of the International Court of Justice.

THE COMMITTEE on Real Property Law, Mendes Hershman, Chairman, again had a very large audience for a symposium devoted to "The How and Why of Title I." Speakers were Walter S. Fried, Regional Administrator of the Housing and Home Finance Agency of the United States Government; Paul T. O'Keefe, Deputy Mayor of the City of New York; Benjamin Pollack, former Chairman of the Committee on Real Property Law; James S. Lanigan and Eugene J. Morris, members of the Committee.

THE COMMITTEE on Art, Edmund T. Delaney, Chairman, will open its annual photographic show on December 3. Members are requested to submit photographs for inclusion in the show.

FOR THE coming year the Committee on Labor and Social Security Legislation, Emanuel Dannett, Chairman, will consider the following subjects: the desirability of amending the New York

Labor Law; methods of expediting National Labor Relations Board representation cases; service of process upon unions and union liability; revision of the rules and procedures of the NLRB and proposed New York legislation concerning union democracy.

At its first meeting the new Special Committee on Banking, Henry Harfield, Chairman, considered, among other areas, for investigation the following: problems incident to the payment of money or property to foreign incompetents or guardians; federal legislation on problems relating to the priority of federal tax liens; the making of out-of-state loans without the necessity of qualifying to do business in the state; revision of the New York Banking Law; revision of the Financial Institutions Act; the possibility of a New York Secured Credit Law and letters of credit and problems incident to them.

The eighth conference of the International Bar Association will be held in Salzburg, July 4 to 8, 1960. All subscribers and Patrons of the I.B.A. are invited to attend. The registration fee will be $25. Registration fees are payable to the Secretary General, Gerald J. McMahon, 501 Fifth Avenue, New York 17, N.Y. Hotel reservations should be made by sending requests to Salzburger Rechtsanwaltskammer, Sebastian-Stiefgasse 3, Salzburg, Austria.

The William Alanson White Institute of Psychiatry, Psychoanalysis and Psychology is sponsoring a course on Law and Psychiatry. The course consists of ten sessions starting February 10 and is limited to lawyers, psychiatrists and psychologists. Information can be obtained at the Institute's offices, 12 East 86th Street, New York 28, N. Y.

The very great success of the two chartered flights to Europe this summer sponsored by the Young Lawyers Committee, Robert Coulson, Jr., Chairman, has encouraged the Committee to start

making arrangements for two more flights next summer. It is the thought that one flight might leave around July 1 and return on July 30. This would permit members to attend the Salzburg Conference of the International Bar Association, which meets July 4 to 8, 1960. The second proposed flight would leave about August 5 and return on August 27. Final arrangements will be announced later.

The Calendar of the Association for November and December

(as of November 4, 1959)

November	2	Meeting of Committee on Entertainment
November	4	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
November	5	Dinner Meeting of Committee on Professional Ethics
November	9	Dinner Meeting of Special Committee on Family Law Meeting of Committee on Uniform State Laws Dinner Meeting of Committee on Administrative Law Meeting of Young Lawyers Committee
November	10	Dinner Meeting of Special Committee on Science and Law
November	12	Dinner Meeting of Committee on Legal Aid Meeting of Section on Labor Law
November	16	Meeting of Library Committee Dinner Meeting of Special Committee on Banking Dinner Meeting of Committee on Atomic Energy
November	17	Dinner Meeting of Committee on Courts of Superior Jurisdiction Meeting of Committee on Arbitration Dinner Meeting of Committee on Municipal Affairs Dinner Meeting of Committee on Insurance Law
November	18	Meeting of Section on Trade Regulation Meeting of Committee on Admissions Dinner Meeting of Committee on Trade Marks and Unfair Competition Meeting of Committee on Foreign Law Dinner Meeting of Committee on the Bill of Rights
November	19	New York City Regional Rounds of Moot Court Competition. Sponsorship Young Lawyers Committee

November 20 New York City Regional Rounds of Moot Court Competition. Sponsorship Young Lawyers Committee
Meeting of Special Committee on the Conflict of Interest Laws

November 21 Meeting of Special Committee on the Conflict of Interest Laws

November 23 Meeting of Committee on Increase of Membership

November 24 Dinner Meeting of Committee on Aeronautics
Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Copyright
Dinner Meeting of Committee on Labor and Social Security Legislation

November 30 Dinner Meeting of Committee on Medical Jurisprudence

December 2 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

December 3 *Opening of Photographic Show,* 4:30 P.M.

December 7 Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on Military Justice

December 8 *Stated Meeting of the Association,* 8:00 P.M., *Buffet Supper,* 6:15 P.M.

December 9 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on the Bill of Rights
Meeting of Committee on State Legislation

December 14 Meeting of Special Committee on Family Law

December 15 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Dinner Meeting of Special Committee on Banking
Dinner Meeting of Committee on Copyright
Meeting of Committee on Arbitration

December 16 Meeting of Committee on Admissions

December 21 Meeting of Library Committee

December 22 Dinner Meeting of Committee on Domestic Relations Court

The President's Letter

To the Members of the Association:

I am especially happy to announce that, upon the recommendation of the Special Committee on Public and Bar Relations, of which Harold R. Medina, Jr., is Chairman, the Executive Committee voted at its October meeting to confer upon Whitney North Seymour the Association Medal. The medal has been awarded to only three other members: Charles C. Burlingham, Robert P. Patterson and Harrison Tweed. The medal is awarded for "exceptional contributions to the honor and standing of the Bar in this community."

All our members are aware of Whitney's lifelong service to the Bar of our State and of our Nation, to say nothing of the many public causes which have been benefited by his wisdom and selfless devotion. He is eminently worthy of the highest honor of this Association, which will be bestowed upon him at the December 8 Stated Meeting.

At the same meeting we will pay tribute to two distinguished judicial members of the Association. Chief Judge Albert Conway, of our Court of Appeals, will reach mandatory retirement age at the end of the year. Chief Judge Charles E. Clark, of the United States Court of Appeals, will retire as Chief Judge, although all of us hope that he will continue to serve that Court for many years to come.

It is with real regret, which will be shared by all who knew of his fine work, that I announce the resignation of Frank H. Gordon as Attorney-in-Chief of the Grievance Committee. Mr. Gordon is resigning to enter the private practice of the law and he takes with him our good wishes and sincere appreciation.

When we asked for contributions to renovate the Reading Room of the Library, we predicted that it would mean a substantial increase in the use of the Library. I was pleased, therefore, when I learned from our able Librarian, Arthur A. Charpentier, that attendance in the Reading Room sharply increased

during the summer. August attendance figures show an increase of 62% over figures a year ago and 50% more than figures of any prior year. For the first time in our history the use of the Reading Room in summer equalled the use made of it during the peak winter period.

As many of you know, our Association, in cooperation with WCBS-TV, has sponsored a television program, THE NEW YORK FORUM, which may currently be seen on Sunday afternoons at 1 P.M. Many of you have doubtless seen the program, but I hope that many others will make a point of viewing it in the future. Our role is to select younger members of our Association to serve as panelists. The guests are prominent figures in state, national and international affairs. The selection of panelists is being ably carried forward by our Young Lawyers Committee, of which, Robert Coulson, Jr. is Chairman. I commend this program to you.

I am sure that all who attended the October Stated Meeting were moved, as I was, by the tributes paid to the late Charles C. Burlingham by Harrison Tweed, Lloyd K. Garrison and Edward S. Greenbaum. These will be published in the December Number of THE RECORD. Though Mr. Burlingham will no longer participate in our counsels, his spirit will always be with those who have the responsibility of carrying forward our Association.

DUDLEY B. BONSAL

October 15, 1959

Why Argue An Appeal? If So, How?

By WHITMAN KNAPP

May it please the Court.

I shall dispose of the "Why" at the outset, by asking you, or at least the male members of my audience, a simple question: If you were trying to get a lady to marry you, would you be satisfied with sending her a letter, or would you think a personal interview might be helpful?

To bring it a little closer, if you were representing the plaintiff in a negligence case, would you be satisfied with a letter to the foreman, with a request that he read it to the other members of the jury, or would you think a personal summation would be helpful?

The reason I give those illustrations is that an appeal, an argument in an appellate court, is just like any other form of the advocate's art. Its purpose is to persuade someone to do something. The methods vary with the particular situation with which you are confronted, but the essential problem is the same whether you have a jury case of one or two days' duration, whether you have an antitrust case that lasts six months, whether you are trying to get a ruling from an administrative division of the Federal or State Government, or whether you are arguing an appeal. Your essential problem is to get someone to do something for you, to get someone to make a decision in your favor.

Personally, I think the argument of an appeal is more difficult than most other forms of advocacy, because you have less time in which to get your point across. You cannot, as you can with an administrative matter, bother the fellow with letters and telephone calls after he thinks he has gotten rid of you. Nor can you, as you can in a trial, correct today the mistakes that you or your associate made yesterday.

Obviously, in a half hour or so, I can't tell you how to argue an appeal. In the first place, I don't know how. I have been at it

for twenty years, more or less, but every time I lose a case, which unhappily happens now and again, I think that whatever I did that time is a classic illustration of what not to do, and every time I win a case, I assume that I have finally found the answer. If you hit me on a day like that, I can give you all the answers with no trouble at all.

If you want to learn how to argue an appeal, you have to learn it like everything else: read about it and do it. As to reading about it, may I commend to you a publication of the American Law Institute, by its Committee on Continuing Legal Education, with three monographs, by a judge, by a lawyer, and by a genius. They are called "The Case on Appeal," a judge's view, by Judge Goodrich of the Third Circuit; "The Conduct of an Appeal," a lawyer's view, by a distinguished advocate, Ralph M. Carson; and "The Argument of an Appeal," by a genius—John W. Davis.

In this book there is also a bibliography of other articles by such people as Mr. Justice Jackson. And if you ever come across anything by Judge Shientag, read it. Anything he ever wrote on arguing appeals—or any other subject—is worth reading.

By reading such things, you can be told how to argue an appeal. All I am going to do is to try to give you a specific point of view or criterion against which you can judge conflicting views you get from various articles or treatises on arguing an appeal. I very much suspect that other people who write are somewhat like myself: if they have just won an appeal, they will believe that what they did in that particular case was good, and if they have just lost a case, they are in a position to tell you what mistakes to avoid. I would just like to leave with you one idea, and then take up (for as long as you will bear with me) various questions that come up in arguing an appeal and give you my reactions to them.

The basic point that I would like you to bear in mind, as a criterion against which to test any tactic or procedure that might be suggested to you or suggest itself to you, is: An argument of an appeal, like every other form of advocacy, has two related functions. Its first function is to appeal to the emotion of your hearer,

to the emotion of the person whom you are trying to persuade to act in your favor. Its second is to appeal to his intellect.

Let us pause a moment on this word "emotion." It is a word which these days is so excessively—and incorrectly—used that it may be misunderstood if not explained. By "emotion" I don't mean anything irrational. I mean neither more nor less than that part (however defined and wherever located) of the human organism which moves it to act. By way of oversimplification, it might be said that all human beings are moved to act by emotion, and guided in action by intellect. The twin objective of an appeal, then, is to arouse the emotion of the judge so that he will be moved to act (if he is not so moved, the judgment will be affirmed without opinion); and to satisfy the intellect so that he will feel it correct to take action favorable to your client.

Every argument—and incidentally I include within the meaning of "argument" both the printed brief and the oral argument, everything that happens from the beginning of your brief to your last word in court—must be geared so as to appeal both to the emotion and to the intellect. I think the basic difference between a competent advocate and a great one is that a competent advocate can only do one or the other, or thinks only one or the other is important. You get competent advocates who are very good in emotional cases, because they are adept in appealing to the emotion. You get competent advocates who are successful in cases that are on the dry side because they have the knack of appealing to the intellect. But a great advocate is one who can appeal to both and knows how to press the two appeals in such a way that one will not get in the way of the other.

Therefore, I simply say to you, as each problem is discussed and as each problem in your own practice comes before you, your decision must turn on the question: How does this particular problem affect the appeal to the emotion and the appeal to the intellect, and how can I prevent one from conflicting with the other?

All right, the case comes to your office—I am assuming you are in that very happy situation where the case is brought to you

after it has been fairly bungled and lost at the trial level. Obviously, from the client's point of view, that is not the best time for you to get into a case, but from the advocate's point of view, it is wonderful. You can then be like the doctor in "Tom Jones" who was asked how his patient was doing, and replied "Oh, she is doing much better than if I hadn't been called at all, but not nearly as well as if I had been called sooner."

If the case comes to you (and you represent the plaintiff) before the complaint is drawn, or the case comes to you (and you represent the defendant) before the first motion is made, everything I am now saying still applies, except that you start earlier. In an ideal advocacy situation, every step you make—from the first word you put down on the first paper you file at *nisi prius* until the last word that you say in the Supreme Court of the United States—should further the twin functions of appealing to the emotion and to the intellect of the tribunal which is going to have the final say in the matter.

But in my supposed situation, your case comes to you with the record on appeal already complete.

The first problem is deciding whether the case is worth appealing at all. In my judgment, in at least eighty percent of the cases that come to the appellate courts, nothing either advocate can do will really have much effect on the result, because the result is foreordained. If you are offered a retainer by an appellant who is clearly in the 80 percent, perhaps the best advice you can give to the client is to save the money he would otherwise pay you for a fee.

But I am assuming now that our case is in the other twenty percent. The problem then is to pick the point you want to urge. This is the most important decision you have to make, because it is my conviction that almost every case that is worth arguing about—that is to say every case that is worth the attention of an appellate court—can be *correctly* decided for either party, depending on what point the Court elects to take as controlling.

If you doubt that, take the split decisions in the New York or United States reports. Read the majority opinion and the

minority opinion. If the majority opinion were the sole opinion or the minority opinion were the sole opinion, there would not be much dispute but that the case had been correctly decided.

Look at the opinions, and you will find that nine times out of ten the judges don't dispute any legal principle, but differ as to the application of some accepted legal principle to the particular case. When you analyze it, the point on which they really differ is "what is the controlling factor in the case?" And the advocate who has the most judges on his side for that particular moment is the greater of the two advocates.

Returning then to that happy day I have postulated, you will probably find that any number of possible points lurk in the record your unhappy client brings you. Your job is to find one point that you can establish as controlling, which point, if correctly decided, would bring victory to your side. It is your opponent's job to find the point on the other side, and then if your opponent and you are equally skilled in picking points, the ultimate decision will turn on your relative abilities to make your point the dramatic one, and convince the Court that it is the controlling one.

You are faced with the problem of selecting a point upon which you can make the emotional argument in harmony with the intellectual argument. If you are the appellant, and you don't succeed on both levels, you won't succeed at all. If you can convince the judges that the Court below is wrong as an intellectual matter, but leave them in the frame of mind that not much damage was done, the case is going to be affirmed without opinion.

If, on the other hand, you convince the Court on the emotional level that your client had a raw deal, but don't convince them on the intellectual level that there is anything they can properly do about it, the case is going to be affirmed, again without opinion.

So in selecting your point, you have to take one that is susceptible of an emotional and an intellectual argument.

Having selected that point, you come to write your brief. In this, I disagree with most everything I see written, because almost everybody I see who writes an article has some specific prescrip-

tion for what form your brief should take. Of course if you are in a Court where the rules provide a specific form the brief has to take, then you must stick with it. You must do what the Court says; at best you can modify it only slightly.

Beyond that, I don't think any rule applies for any two cases. Almost every article that I have read will say, "If you have a *statute,* quote the statute." Well, that is good advice, most of the time. But I can remember a case I had as respondent in the Supreme Court of the United States, where quoting the statute would have been one sure way of losing the case.

It was the first State wire tapping case that got before the Supreme Court of the United States.* No opinion was published, because it was affirmed by an evenly divided Court. The issue was whether or not the State of New York had the power to tap wires in violation of the Federal Communications Act, which prohibits wire tapping by "any person."

My contention was that Congress had not intended to prohibit wire tapping by State officers operating under express authority of State Court orders. Quote the statute? To what avail? Its language contained nothing to advance my argument. To be sure, I could not prevent the Justices from finding it themselves (indeed, I included it in an appendix), but I surely was not going to encourage them to dwell upon its unfavorable (to me) phraseology at the very moment I was urging them to ponder fundamental questions of State sovereignty.

That whole case presents an interesting test of my theory of the single issue with the emotional *and* intellectual appeal. There then were, as there still are, two fundamental judicial philosophies contending for the allegiance of Supreme Court Justices. Roughly speaking Mr. Justice Black is the great exponent of the one and Mr. Justice Frankfurter of the other. Members of the former group are, in general, activists who believe that it is the Supreme Court's function to set things right any time the Constitution or a statute gives the slightest excuse for taking action. The latter, on the other hand, are non-activists who believe

* *Stemmer and Krakower* v. *New York,* 336 U.S. 963.

that the setting-right function should be left to state and federal legislatures who should have the broadest scope possible under the Constitution. Adherents of this philosophy are apt to feel especially strongly that local police power is peculiarly a matter of state concern, and that the states should—within broad limits—be allowed to establish their own moral standards for the exercise of police power.

But both groups see eye to eye on two points—their belief that the Congress has almost unlimited power in the regulation of interstate commerce and their abhorrence of wire tapping.

So there was my problem. I looked for no help from the activists. They despised wire tapping and believed themselves to have a mandate to put an end to it. There seemed, however, to be some hope from the others. If they could be made to think in terms of police power and not in terms of interstate commerce, there was some hope for me. So both my brief and oral argument were devoted to exposition of the various ways the New York Legislature, the New York Constitutional Convention and various committees of the Congress had at various times wrestled with the moral and practical problems surrounding the question whether wire tapping should be allowed as an adjunct of crime detection and prosecution. I never so much as mentioned the circumstance that telephone calls sometimes strayed across state lines, nor did I even indirectly advert to the words of the statute.

I was trying to focus attention on the moral and practical problems posed by the use of wire tapping as an adjunct to police action, and thus invoke the intellectual doctrine—held by the non-activists with emotional conviction—that state police power is an area which Congress should not lightly be presumed to have invaded. My opponent actually furthered that strategy by arguing the moral iniquity of wire tapping, thus helping me to keep the non-activist Justices preoccupied with the very moral questions they conceived as peculiarly identified with State power. The result: affirmance by an equally divided court.

Had I been on the other side, I would not have said a word about morals. I would first have emphasized the terms of the

statute, which clearly displayed Congress' determination to protect interstate communications from interception by "any person." The rest of my brief and oral argument would have been devoted to evoking a picture of the telephone system as a nationwide spider of crisscrossing interstate cables. I would have ascertained—and asked the Court to take judicial notice of—the average daily number of calls from New York to Washington, New York to Newark, New York to San Francisco, and New York to almost every city in the land. The purpose would have been to make it seem absurd for Congress to have sought to protect these millions of interstate calls from interception by "any person" (including the military and the F.B.I.) and then sit supinely by while deputy sheriffs and police officers from 48 states happily tapped the very wires over which these millions of calls were passing. Of course, I have no way of knowing whether the result would have been any different.*

Now, one problem always comes up: if you have two or three good points, have you the right to reject one or more of them even if they might conceivably bring victory to your side? Well, I say you have both the right and the obligation to do so.

I am not unmindful of the fact that "sieve briefs" (it was Mr. Justice Dore who described as a "sieve brief" one that tosses ideas at the Court like a shovel full of sand in the hope that something valid will be sifted out) sometimes triumph, and that, when you elect on behalf of your client to make one point, you sometimes fail to make it stick and therefore lose.

But I say this, that no two points should be made which are emotionally inconsistent with each other. Under the rules, there is nothing to stop you from making inconsistent points, but you

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* The Supreme Court has in recent years evolved the doctrine that Congress *did* intend to interdict tapping by State police officers and that such officers commit Federal crimes when they tap wires and when they divulge the tapped information in State courts, but that convictions resulting from the commission in open court of such Federal crimes may nonetheless be sustained [compare Schwartz v. Texas, 344 U.S. 199 with Benati v. United States, 355 U.S. 96 and see Hofstadter, J., *Matter of Interception of Federal Communications* (Sup. Ct. N.Y.Co.) 9 Misc. 2d 121].

defeat yourself if you make points that are emotionally inconsistent with each other, because you have violated the cardinal principle with which I started.

For example, you can't say, if you are representing an appellant in a criminal case, "Point One: everything that was shown at the trial proves my client to be innocent, because all the evidence taken together is inconsistent with any hypothesis of guilt" and then go on to say, "Point Two: this and that evidence should not have been admitted, and was so prejudicial (indicative of guilt) that it obviously affected the jury."

There is nothing intellectually impossible about that, but emotionally it doesn't work. Either all the evidence taken together establishes that your client is innocent, or some of it tends to show that he is guilty but for some important legal reason shouldn't have been received.

If you say, "Point One, all the evidence shows 'A,' but, Point Two, this particular piece of evidence which violates this and that rule is so strongly indicative of 'B' that I need a new trial to eliminate it," you have lost your argument. You have lost the Court; you may still have its intellectual interest, but you have lost its emotional interest, and you are through.

A word on briefs. In order to get the emotional interest of the Court, every fact should have been stated in your brief before you get to "Point One." Nothing should be stated for the first time in the argument, either pro or con. If it is pro, it loses force by being first stated in argumentative form. If it is con, and the Court first learns of it in the course of your brief's argumentation, there is no time for the Court to digest it, and you are in trouble. Get your disagreeable facts into your brief early, so the Court has time to digest and assimilate them. The facts should be stated in a non-argumentative fashion, but should be marshalled in such a way that they elicit both the intellectual and the emotional interest of the Court. So by the time you get to "Point One," you really start repeating what you said before, this time with the aid of cases—use quotations from cases to repeat what you

have already said in the statement of facts, thus shifting the Court's interest in your argument from an emotional to an intellectual level.

Be sure that your folio references go beyond what you say in the brief. The judge, obviously, is not going to read every folio reference you cite, but presumably he is going to read some of them. Therefore, it is of the utmost importance that when he does read a folio reference, it carries him a little farther than what you said in your brief. If so, he immediately has a sense of confidence in what you have said, an emotional satisfaction in your brief, and he is carried forward. Remember that a brief does not get its persuasive qualities from exaggeration or strong statements. It gets them from organization.

So far as your brief is concerned, it obviously should be readable. Moreover, it should be underplayed, rather than overplayed, and it should not have a lot of emotionally conflicting sub-points. Everything in the brief should appeal both to the intellect and to the emotion of the reader, and should be intelligible to any reasonably intelligent person. If you have a long-suffering wife, get her to read it for you. If you haven't, get some other layman to read it and tell you what is in it, and if he doesn't tell you correctly, don't get angry with him but do it over again.

Now, coming to oral argument, as I have said before, I don't think there is any case that should not be orally argued—that is, by the appellant. There are some cases that the judges won't let you argue. On those cases, try to get around the rules, make an application to argue, if you can. If they won't allow it, there is nothing you can do about it. But there is no case for the appellant that is worth taking that shouldn't be argued—even if you only say a single sentence.

Now, what do you want to accomplish on argument? One thing you don't want to accomplish is to win the case on oral argument. If you try to do that, you serve your client much better if you stay home. All that you can accomplish on the intellectual level is so to interest the Court in the controlling phase of the case that when the judges get to their chambers they will see the record from your point of view.

If you try to persuade the Court that you are right, you are going to fail, simply because the Court hasn't time during the oral argument to find out whether or not you are right. Moreover, you are going to be driven to making overstatements which your opponent is going to catch you up on, or which some judge is going to catch you up on when he goes back to his chambers, and you are going to fail in your objective.

You may win the case anyway, if your opponent's case is hopeless, but your oral argument will have accomplished nothing, in my judgment, if you try to win the case by it. It will have accomplished a great deal, on the other hand, if—on the intellectual level—you succeed in interesting the judge in that phase of the case which will, on his own research, bring the decision to your side.

What about the emotional level? Emotionally you must leave the judge with an impact—a feeling which communicates itself from you to him on an almost subconscious level—that establishes a confidence in the correctness of your cause, a sense of the urgent importance of having this particular case decided in this particular way.

If you have selected your point correctly, you can do this. If your client happens to have a sympathetic case, then you have an easy job. You have the emotional job of showing the Court what a terrible deal your client has gotten, and the relatively simple intellectual job of providing a rational basis for vindicating your client's rights.

If, on the other hand, your client hasn't a sympathetic case—for example, if your client is pleading the statute of limitations and doesn't even want the judges to find out what your opponent says he has done, then you have an entirely different problem. You must emotionally convince the Court that the particular legal point involved is so important that it would be a disservice to the administration of justice to let this particular judgment stand.

But let me repeat: You shouldn't use the oral argument to establish the correctness of your position; you should use it to impress upon the judges your own moral conviction, which com-

municates itself to them in various ways, and then direct their attention to that phase of the case which will establish your point for you when they start discussing it in conference.

And don't miss any opportunity for communication between you and the Court. If there is a long calendar call, don't send a junior to answer it. Be there yourself. If the judges know that you are going to argue, and if the last time you were there you made a good impression, they wonder what you are going to say. You have made a little opening into the emotional part of your argument. Moreover, something might happen in the course of the calendar call which may have value to your client.

I remember a case where George Z. Medalie represented the appellant. The case was on the calendar in the Appellate Division, on the last day of the June term. This was a long time ago when Appellate Division calendars used to be inordinately long and no appellant wanted to appear on the closing day of the June term.

When the case was called, as frequently happened in those days, there were about twenty-five cases on the calendar. The Presiding Justice had announced at the outset that the whole calendar was going to be disposed of within the four hours. About the twentieth case down, *People* v. *Zilch* was called. The Presiding Justice said, "What kind of a case is this?"

The learned District Attorney—this was in the days before Thomas E. Dewey, I might hasten to say—was represented by a young man in his office. He got up very brightly and said, "It is a criminal case, your Honor,"—which obviously was not much news to the Court.

Mr. Medalie just sat there and waited until the young man and the Presiding Justice had gotten themselves completely embroiled, and the young man was offering to telephone his office and find out what the case was really about. Then Mr. Medalie came up and very quietly said, "Your Honor, I represent the defendant"—and in a word stated the argument for reversal. He didn't argue, he just stated what the case was about in such a way that all five judges were immediately interested.

The net result was that the judges had a huddle and then

agreed to come back at seven-thirty that evening for a special session to hear this particular case. As I subsequently learned from Mr. Medalie, the argument lasted until ten o'clock. There was a unanimous reversal.

Obviously, I don't know what would have happened had this not transpired. But it is clear that by being there at the call of the calendar when his opponent wasn't there, by waiting until the Court was irritated with the young representative from the other side, he got the greatest possible receptiveness in the Court's mind, and was able to get this extraordinary privilege of a special hearing at seven-thirty that evening. I wager that most of the day, while they were listening to dull arguments, including mine, they had in the back of their minds, "I wonder what Mr. Medalie is going to be saying tonight," and by the time he got there, he had them vitally interested in his problem. Half his battle was won. If you remember Mr. Medalie, you know that if you gave him half the battle, you rarely won the other half.

Other problems come up involving the emotional factor. Who should argue the case? Should the trial lawyer handle the appeal himself, or should it be given to some other lawyer to argue? Should the senior make the oral argument, or should a junior? That depends entirely on the emotional factor. In general, I would say that if there has been a trial and you have lost below, somebody else should handle the appeal. That is not because you have made mistakes below, but because you are committed to an emotional experience in trying that case, and things that seemed important to you at the trial level are not necessarily important at the appellate level. Unless you are a real genius, you will find great difficulty in completely eliminating from your mind and feelings things that happened to you at the trial level—things that that incompetent judge did, things that your outrageous opponent did which the judge let him get away with—these things will still remain with you, even though you have enough sense not to say anything about them; and they will be a detriment to the emotional impact that you make on the Court. If it is a close case, that slight detriment may be enough to cause you to lose.

Should a senior or a junior make the oral argument? I am assuming that the senior is an expert and really knows how to argue a case better than his junior. It doesn't necessarily follow that he should argue. Assume that it is a case, such as I have suggested, where the sympathy is not altogether with your client—but there is some principle of law involved that really should control. If you are the senior, before you decide to argue, consider very carefully whether a younger man is perhaps more genuinely excited by that principle of law than you can be. Maybe he has developed it. Maybe he has worked it out and thus has a vested interest in its importance. If so, give serious consideration to letting him argue. Your argument may transcribe better, you may make it more skillfully, but if he is more genuinely excited by it, he might communicate that excitement to the Court and win the case, where you might not.

If you have not been familiar with the particular court in which you are to argue, for heaven's sake, go there the day before the argument to watch and listen. I can't, for example, think of anything that would be more devastating than to appear in the Appellate Division, First Department, today, ready to argue a case, if you have not been there in the last ten years. Because you will find an entirely different method of approach. An argument suitable ten years ago would be wholly ineffective today. You would be up in the air in no time at all.

In those days, as in the Court of Appeals today, the judges did not acquaint themselves with the record or the briefs, their purpose being to give the arguing attorney an opportunity of addressing them before their minds had even begun the opinion forming process.

Today in the Appellate Division, the judges have read the briefs, they have had a preliminary conference on the briefs, and they have very clear ideas of what they want to hear about. Therefore, if you have been in the habit of arguing in the Court of Appeals, or in the former Appellate Division, and you show up there, and are early on the calendar, you are going to be thrown

completely off your stride when you discover that the argument you had prepared is wholly inappropriate.

Now, it doesn't do you any good to ask people what is going to happen, because what you have to do is to get the personal impact of how questions are put, and how the judges want them to be answered. If you are not familiar with the Court, spend a day in the Court and get yourself emotionally in tune with it, so you can give impact to your argument.

When you are answering questions, remember my twin points. One of the categorical things it says in these books is that you should always answer the question when it is put to you. I am inclined to doubt it myself. But if the question is put to you at an inopportune time, give an indication of what your answer is going to be. If it isn't the right time in your discussion to answer, say, "Your Honor, the answer ultimately will be 'yes,' but if your Honor will bear with me, I will bring it out later." Then when you come to it, say, "Your Honor, when you asked such and such a question, I said the answer would be "yes," now here are my reasons * * * ."

The basic thing to remember is you are not there to tell the Court what it wants to hear. You are there to make it want to hear what you want to tell it. Remember another thing, the basic art of argument is repetition. Repeat at every opportunity you get, and repeat the important facts. So if you have made a point, and a judge asks a question, you might deliberately save it so you can answer later on and repeat the point you are making.

One of the most brilliant performances I ever heard in my life was an argument by Judge Proskauer in the Appellate Division, First Department. He told the Court at the outset that he had three points. He stated the first point, and then said, "That was my first point, your Honors." Then he recapitulated and went on to his second point. Then he said, "Those were my first and second points," and reviewed the two together. Then he stated the third point, and "By way of summary," reviewed the three of them. Each point was identical to every other point. But you didn't

get that impression as you were listening to him. You got the impression each time that you were hearing something new, and it wasn't until you were all through and were wondering how the court below could have been so stupid, that you recognized the artistic performance you had witnessed.

Similarly, a fundamental of every brief is repetition. When you quote a case, never let the case say what you quote it for. First, in your own language say what you think the case stands for, then go on with something like, "Thus, the Court observed" and then let the Court make your point over again. Use the quotation for the purpose of repeating. Use every device you can to repeat, once you have decided what it is you want the Court to hear.

I have gone over my time, so I will just say one thing about rebuttal. The articles I read seem to be very chary of rebuttal, and they indicate that it is a dangerous thing if you are the appellant. I think they are right to be chary, but if you can remember what your objective is, what you are trying to accomplish, rebuttal can be very useful, if you do it right.

What you should do is copy every question that any judge asks the other side. Just make a note of what judge it is and what question it is. Surely, if your argument has been at all effective, one of the judges will ask a question which your opponent will want to duck. The reason he will want to duck is that the answer favors you. So for your rebuttal, just get up and say, "Mr. Chief Justice, you asked Mr. Jones such and such a question. I think if your Honor will turn to page 88 of the record, folio 264, in the middle of that folio you will see the testimony of the witness Zimmerman." Then pause, let him get the book—never tell a judge what is in the record until he has it in front of him. Then you say, "The witness Zimmerman said thus and thus. I think that is the answer to your Honor's question." Then sit down.

Use your rebuttal to pick up something that the judge has said to the other side, and use it so the last word that was said in your case (as the lawyers in the next case are scuttling up behind you) is a word that has to do with the main point that you are arguing.

Which, being my last word, I shall sit down.

Scope of Federal Trade Commission Orders In Price Discrimination Cases

By EARL W. KINTNER and EDGAR E. BARTON

MR. KINTNER

I embrace the opportunity to discuss one of the Federal Trade Commission's most difficult problems before this informed group. I am honored to share the platform with Edgar Barton, to whose keen mind and persuasive presence I am no stranger. In fact, we have recently exchanged ideas on this very subject before a different forum—the Court of Appeals for the Seventh Circuit.

Before getting on with the subject, I must say a word about my limitations. As an employee of the Commission, I am not authorized to speak for it. The point of view and opinions that I express will be my own and not necessarily those of the Commission. Moreover, as the discussion deals with a field in which the law is still developing, there might be some temptation to discuss and analyze real cases and to plug the Commission's position in them. I shall carefully avoid that temptation and address myself generally to the problems the Commission faces in formulating cease and desist orders in price discrimination cases. Furthermore, I shall avoid discussing the terms of any specific order, as the myriad factors involved in any one situation cannot be examined with sufficient care and objectivity in this kind of meeting.

I think I can best serve your interests if I try to indicate the nature and variety of the problems encountered in drafting orders that are effective from the point of view of the public interest, fair to the respondents involved and to their competitors, and at the same time are in accord with economic realities. In doing so,

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Editor's Note: The remarks of Mr. Kintner, now Chairman of the Federal Trade Commission, and Mr. Edgar E. Barton, former Chairman of the Section on Trade Regulation, were delivered before a joint meeting of the Sections on Corporate Law Departments and Trade Regulation in May, 1959.

I do not mean to suggest that I have all the answers or that the Commission has solved all of the problems.

However, we *can* begin with some pretty well-settled principles in mind.

There is a large body of existing law on the general subject of drafting orders—

These precedents and principles are derived from the efforts of district courts and other government agencies to draft orders. While those sources will provide us with valuable background, I am dealing today with problems that are peculiar to the Federal Trade Commission. For that reason I shall confine my discussion to Commission cases which are our guideposts in approaching the problems presented by specific situations. In this connection I am thinking particularly about such cases as: *Hershey Chocolate,*[1] *Jacob Siegel,*[2] *Morton Salt,*[3] *Ruberoid,*[4] *National Lead*[5] and *Niehoff* cases.[6]

I look upon the *Hershey Chocolate* case as standing for the proposition that an order should not be limited to proscribing the specific acts by which the violation was manifested but that, to be of any value, it must also forbid the unlawful method employed. In this particular case the court approved an order inhibiting unfair practices in connection with several different confectionery items even though the complaint was limited to one item.

The *Jacob Siegel* case stands for the proposition that the Commission, as an expert body, has wide latitude in fashioning its orders and the courts will not interfere except where the remedy selected has no reasonable relationship to the unlawful practices found to exist.

In the *Morton Salt* case the Supreme Court disapproved a Commission price discrimination order containing provisos per-

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1 *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968 (C.A. 3, 1941).
2 *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608 (1946).
3 *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37 (1948).
4 *Ruberoid Co.* v. *Federal Trade Commission,* 343 U.S. 470 (1952).
5 *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419 (1957).
6 *Federal Trade Commission* v. *C. E. Niehoff & Co.,* 355 U.S. 941 (1958).

mitting certain price differentials "if they do not tend to lessen, injure or destroy competition." I look upon this case as standing for the proposition that the Commission may not shift to the courts the job of determining whether or not a particular price difference may have the effect prohibited by the statute.

The *Ruberoid* case is the most significant touchstone of them all. There the Supreme Court reaffirmed the principles of the *Hershey* and *Siegel* cases as specifically applied to a price discrimination situation. The Court emphasized that the purpose of Commission orders is to prevent illegal practices in the future. It said that—

> "In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."

The particular discriminations charged in the *Ruberoid* complaint arose from a system of customer classification, but the Supreme Court approved a broad-scale order prohibiting discrimination between competing customers of the seller. The Court also held that "cost justification" and "good-faith-meeting" provisos were not a necessary part of an order. This is so, it said, because, even if they are not stated, the provisos are necessarily implicit in every order issued under the Act.

The *National Lead* case is perhaps most important from the point of view of conspiracy orders, but it again reaffirms the *Siegel* doctrine that the Commission's judgment in fashioning orders is not to be interfered with unless it is arbitrary or clearly wrong.

The *Niehoff* case, which is of very recent vintage, held that it is for the Commission to decide whether its order against one member of an industry ought to be held in abeyance until the Commission has also proceeded against other members of the industry. This case focuses attention upon the possibility that in some types of situations the Commission might find it advisable

to set the effective dates of orders so as to avoid putting any particular member of an industry at a competitive disadvantage.

Starting from those general principles, the Commission must fashion orders that are responsive to a wide variety of situations.

Price discriminations, of course, all involve different prices charged different buyers from the same seller. The cases, however, are conventionally classified according to the economic interest that suffers by reason of the discrimination. If a competitor of the seller is injured, we have a primary line case, whereas if one of two competing customers of the seller is injured, that is a secondary line case. Each of these categories requires a different type of order and, for that reason, I shall discuss them separately.

Secondary line cases take many forms, depending upon how the discrimination is effected. Some discriminations, for example, arise from annual volume rebate systems or other discounting practices, others arise out of the seller's classification of its customers, and still others from unequal terms of sale. In some other cases, however, the discriminations are not a part of a particular system but are merely aberrations of essentially sound, nondiscriminatory pricing methods. Each of these, of course, suggests a peculiar sort of problem in order drafting.

One principle is clear—where the respondent has employed a general system of discrimination, whether by use of quantity discounts, or customer classification, or variable terms of sale, or some other method, the Commission's order will not be limited to merely inhibit that particular method in the future. This is the teaching of the *Ruberoid* case and it is a primary principle of drafting effective orders in this field. The reason is plain. For example, if a seller discriminated by using a quantity discount system and the order prohibited only that system, it could be evaded easily. All the seller would need do would be to shift to a customer classification system that would accomplish the same discrimination but would not violate the order. In such event the Commission would be in the position of having won a law suit and lost a cause.

Sound administration requires that the Commission in fashion-

ing its road block, anticipate that the respondent may in the future use different means to the prohibited goal.

I fully appreciate that Justice Jackson, dissenting in the *Ruberoid* case, took the Commission to task for not fashioning an order more clearly responsive to the facts of that case. We at the Commission were most interested in his remarks but while I have read and reread that well-written dissenting opinion, I have failed to find that he offered any solution. He highlighted one of the basic problems involved in drafting price discrimination orders, but came no nearer solving the problem than I am coming tonight. Respondents claim time and again that the Commission's order merely prohibits what the statute already forbids: that the statute says "Don't discriminate," the Commission's order, in effect, merely repeating that injunction. But experience has demonstrated that we cannot confine our orders to the particular system from which the price discriminations in question arose without inviting evasion and another law suit.

While it is true that many of our orders broadly inhibit discriminations, there are also many situations in which the Commission is able to confine its road block more narrowly and still have an effective order. This is particularly the case when the statutory violation has not been effected through a systematic method of discrimination, but rather is an aberration of a legal and nondiscriminatory price structure. Typical examples of this are the *Auto Safety Glass* cases.[7] Each of the two largest sellers of auto safety glass was charged with discriminating in favor of one of the two largest manufacturers of automobiles, but no other price discrimination was charged. The order in each case merely prohibited discrimination in favor of the auto manufacturer in the sale of safety glass to be used for replacement purposes. In those cases it was possible to write an order responsive to a narrow and specialized factual situation because no other potential discrimination was evident.

Another problem that frequently presents itself is the breadth

[7] *Matter of Libby-Owens-Ford Glass Co.*, F.T.C. Docket 6700 (May 22, 1957), and *Matter of Pittsburgh Plate Glass Co.*, F.T.C. Docket 6699 (April 19, 1957).

of the product line which properly should be covered by an order. The most persuasive authority in this field is the *Hershey Chocolate* case. There it was held that a company manufacturing a broad line of chocolate items could be restrained from violating the law in relation to its entire line, even though its illegal practices had extended only to a portion of the line. The key to this decision and my reasoning on this problem is to be found in the relationship between the various items being sold. In the *Hershey Chocolate* situation, the discriminatory pricing system might easily have been extended to cover or substituted to cover similar items not involved in the original proceeding. However, when a seller markets items that are not thus closely related I can generally say that such unrelated items would not likely be covered by an order.

I know you are all interested in this question of product coverage. Well, frankly, there is no easy answer. Maybe I can explain why that is so with a couple of hypothetical examples.

First, take the relatively simple case of a seller of automotive replacement parts. He is using a discriminatory system to price those parts, but there are a few items that he sells net. Quite obviously they are like or related items and they will be covered by the order.

Now let us complicate this operation a bit more. Assume that the same seller also markets a line of aviation replacement parts. Let us assume further that the Commission's attention has been focused on automotive replacement parts and that there is a reasonable probability of injury arising from the discriminations in the automotive parts replacement line. We know little or nothing about the probability of injury arising in the aviation replacement parts industry. The only thing we know is that the same system is being used in both markets. Now, the question is whether the order should cover both aviation parts and automobile parts or should be limited to automobile parts.

The answer to that question requires more information about the aviation replacement parts market. It might be that sellers are so scattered and non-competitive that the possibility of injury is remote, in which event the order would probably not be ex-

tended to the aviation line. Or, on the other hand, market analysis might indicate that injury is likely and, therefore, that the order should also prohibit discriminations in the aviation line.

The ramifications of this problem must be as manifest to you as they are to me. We could complicate the position of our hypothetical manufacturer even further and each time we entered a new complicating factor the problem would become that much more complicated and its solution that much more difficult. No one has ever yet suggested that the Commission knew all the answers and I can tell you frankly that I don't.

The geographic extent of an order, at least in secondary line cases, is a problem that is occasionally raised by the respondent. We do not find this troublesome. We believe that the difficulty usually arises because respondent's counsel misunderstands the nature of Commission proceedings. The usual argument points out that the Commission has proved its case by evidence taken in two or three different cities indicating that a system of price discrimination is being practiced in each of those places. On that basis, respondent's counsel sometimes argues that the Commission's order should not be general in its application, but should prohibit discriminations only in those cities. This is not correct and has no support in case law. The Commission's proof indicates the existence of a system of discriminatory pricing, of which the situation in those cities is merely illustrative. In such circumstances the Commission will prohibit price discrimination on a nationwide basis unless respondent discharges the burden of proving that the discrimination in those areas was only an aberration of a non-discriminatory pricing system.

In any event, Commission orders in the secondary line cases are, at least in one sense, inherently limited in area. This is so because they prohibit price discriminations only between competing customers. Therefore, the area of effectiveness with respect to any pair of competitive customers would be that area in which they compete.

Still another difficult problem that we must consider is that of fairness among the competitors in industries in which all of the

sellers or many of them are discriminating among their customers. This problem was dramatically presented in the *Niehoff* case. There the respondent claimed that if an order were issued against it before orders were issued against its competitors, it would be forced out of business. The Commission found that the respondent was violating Section 2(a) of the Clayton Act and refused to delay the effective date of its order. Upon review, however, the Court of Appeals for the Seventh Circuit agreed with *Niehoff*. It affirmed the Commission's order but held it in abeyance—presumably pending the determination of other price discrimination cases which were then pending against other members of the automotive replacement parts industry.

I had the privilege of presenting the Commission's case before the Supreme Court, which reversed the Second Circuit's decision and directed affirmance of the Commission's order in its entirety. The Court's opinion recognized the broad scope of administrative discretion that Congress has given to the Federal Trade Commission and it pointed out that "in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment." The Court noted the variety of factors which would effect this kind of decision, such for example, as: To what extent is there a relevant industry within which the respondent competes? Is the nature of that competition such as to indicate identical treatment of the entire industry? Does an allegedly illegal practice in fact exist throughout the industry? If so, should all firms in the industry be dealt with in a single proceeding or should they receive individualized treatment? It concluded that "The Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress . . ."

Despite the favorable decision in the *Niehoff* case, we at the Commission recognize that the timing of Commission orders in such competitive situations does present a very real problem in many cases. The Supreme Court has held that this is a problem peculiarly within the Commission's special competence. The Commission must examine each such situation and sometimes

strike a balance between the conflicting interests of the consuming public and competitors in the industry. This will not always be an easy task, but it is a necessary one.

Primary line cases are less diverse and less numerous than secondary line cases, but they present an even tougher problem of order drafting. Here we are not concerned with the adverse effects of a price discrimination upon buyers, but rather upon competitors of the seller.

The typical primary line case involves a large seller who injures his smaller competing sellers by discriminating among his own customers. Generally this is accomplished in one of two ways: Either (1) by selectively lowering its prices to certain large purchasers or (2) by lowering its prices in one area while maintaining or increasing them in all other areas.

The *Moss*[8] case is a good example of the first kind of primary line case. There a manufacturer of rubber stamps accorded discriminatory prices to certain of its large purchasers. There was little or no injury to its customers who were charged the higher prices, because rubber stamps constituted a very small fraction of their business. However, there was serious injury to Moss's smaller competitors, because they were unable to compete for the business of the purchasers favored by Moss.

The other type of primary line case is the area price discrimination. Here, typically, a large manufacturer sells its product nationally or at least over a wide geographical area, whereas, in a certain small portion of that area, it has one or more competing sellers. The large manufacturer lowers his price in the area in which it has competition, but maintains or increases its prices elsewhere. The result, economically, is to increase the demand for the seller's goods at the expense of the local competitors in the area of competition, while its sales and returns from the remainder of its territory remain unchanged. The local competitors may either maintain their sales by cutting their prices and thus reducing or eliminating profits, or they may maintain their

[8] *Matter of Samuel H. Moss, Inc.*, 36 F.T.C. 640 (1943), affirmed *sub nom. Samuel H. Morse, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378 (C.A. 2, 1945).

prices and lose sales to the large manufacturer. Whichever course they choose, the result affects their entire business. In the meantime, the large manufacturer may have lost some revenue in the area of competition, but this effect is minor because the great majority of its sales are made outside the area of competition. The obvious result is potential disaster for the local sellers.

The problem of fashioning a suitable order arises when the Commission proceeding has determined the existence of a primary line discrimination with the requisite injury to competition or tendency to monopoly and outside the protection of the provisos to Section 2(a) of the Clayton Act. The Commission's task is to fashion an order that will terminate this method of competition without imposing an inflexible price structure on the market.

One type of order prohibits selling to any purchaser at prices lower than those granted to any other purchasers where the respondent is in competition with any other seller. Another type prohibits selling to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce, where such lower price undercuts the price at which the purchaser charged the lower price may purchase products of like grade and quality. The latter type of order was first used in the *Maryland Baking Company*[9] case, which involved a typical area price discrimination. Although the Commission has used this same form of order in some subsequent primary line cases, I must confess that I do not believe it solves all the problems and I am not completely happy about it.

Both of the types of orders I have mentioned are aimed at primary line discriminations that *undercut* the local competition. In each case, there is a degree of built-in flexibility in that the respondent may always react immediately to the downward price moves of his competitors. Perhaps this only makes clear the protection that is afforded by the "good-faith-meeting" proviso.

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[9] *Matter of Maryland Baking Co.*, F.T.C. Docket 6327 (June 29, 1956), affirmed *sub nom. Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 716 (C.A. 4, 1957).

But a different problem is presented in the event the local competitors should raise their prices *above* those of the respondent. According to the terms of those orders, the respondent would be required either to sell at a uniform price everywhere, or at a higher price in the area of local competition than elsewhere, or at a price not lower than that of his local competitors. Thus, such an order would seem to place in the hands of the local competitors, under certain circumstances, the power to dictate respondent's minimum price in a rising market.

Still another type of primary-line order, tailored for a special situation, is one that prevents respondent from reducing prices in any market in which it is in competition with any other seller unless it proportionally reduces prices everywhere. This order is aimed at preventing local price cuts even though they may not undercut the prices at which the local competitors are selling. Although it might seem at first glance to impose an inflexible national pricing system upon the respondent, the *Ruberoid* doctrine prevents this. This is so because, in any new factual situation, the respondent could avail itself of the "good-faith-meeting" proviso or the "cost justification" proviso. Therefore, the order would merely prevent the kind of local price discrimination that had already been litigated and found to be illegal.

I am sure that you will appreciate from the examples I have given that drafting orders in price discrimination cases is not an easy job.

In concluding my remarks, let me repeat again that it is always the aim of the Federal Trade Commission to fashion an order that will effectively stamp out the illegal practice and, at the same time, be fair to all parties concerned. I am frank to admit that we have not always been satisfied with the results of our efforts.

The Commission does not adopt the intransigent attitude of Lewis Carroll's Humpty Dumpty that "when I use a word . . . it means just what I choose it to mean—neither more or less." Rather, the Commission is willing to be shown its errors and is anxious to draft orders that all may understand and obey.

Let me emphasize, however, that you lawyers who represent

the business community also have an obligation. Congress laid down the Robinson-Patman Act a long time ago. You will agree that there is no indication that it will be repealed. It is here to stay.

Carping and destructive criticism will be of no avail to your clients. It is your duty as lawyers, just as it is our duty as administrators, to see that the business community abides by the Robinson-Patman Act. We need your help, including your thoughtful suggestions on the drafting of fair and effective orders, to accomplish this. To the extent you and your clients cooperate, voluntary compliance will replace costly and troublesome litigation. Everyone concerned will benefit from that.

MR. BARTON

I

A discussion of the scope of Federal Trade Commission price orders falls into two different categories. One relates to the situation in which the conduct has been of such a nature that the Commission found injury in the secondary line of commerce, namely, among customers of the seller. The other type of order relates to the situation in which the Commission found injury in the primary line of commerce, namely, the seller's line of commerce. I shall discuss separately the orders and the interpretations which are to be given to them.

II

The orders of the Federal Trade Commission in secondary line cases have changed radically in nature over the past twenty years of enforcement of the Robinson-Patman Act by the Commission. The earliest orders of the Commission were phrased in terms of prohibiting the type of conduct which was found in the findings of fact. Thus, in the *Standard Brands* case, which is one of the earliest orders of the Commission in a case under the Robinson-Patman Act, the respondent was, among other things, ordered to cease and desist from discriminating in price between

different purchasers of bakers yeast of like grade and quality either directly or indirectly: (1) by selling said bakers yeast at different prices based upon the total quantity or volume purchased or required monthly by the respective purchasers, as set forth in Schedule A to paragraph 10 of said findings of fact.

Further, the earlier orders of the Commission typically provided that discriminations in price were prohibited only where the effect may be substantially to lessen competition or tend to create a monopoly. Finally, the early orders of the Commission almost uniformly contained provisos which rendered the order inapplicable when cost justification was shown or when the meeting competition defense was established.

Although there are some variations, depending upon whether there are indirect purchasers, the secondary line order which is almost routinely entered in a case arising presently reads in either of the following ways:

(1) The respondent is ordered to "cease and desist from discriminating directly or indirectly in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who in fact competes in the resale and distribution of said products with the purchaser paying the higher price."

(2) An alternative type of order is that which has been entered in the recent *Sun Oil Company* case which, among other things, orders the Sun Oil Company to "cease and desist from discriminating in price by selling such products of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale and distribution of respondent's products." Although different language is used in the different orders, some prohibiting net prices higher than the net prices charged other competing purchasers and others prohibiting net prices lower than those charged other competing purchasers, the apparent effect of the orders is the same. There is no explanation in the decisions for the difference in the wording of the orders.

What is the interpretation which is to be given to such orders?

The key words of the modern order are "purchasers who in fact compete." Although these appear to be words of limitation, in point of fact, such limitation may be illusory. Insofar as the customers are engaged at the same level of distribution, i.e., retailers or wholesalers, the fact of overlap of areas of competition renders the maintenance of price differences hazardous. Obviously, there will be situations where in fact the clause can be utilized to avoid the application of the order. One obvious place it applies is when sales are made to both wholesalers and retailers. It is not necessary to sell to both at the same price under such an order. However, such an order creates grave problems for a respondent in an industry where some of the distributive components are engaged in both wholesaling and retailing.

The next question which arises concerns the requirement of the statute that before a difference in price amounts to a discrimination, such difference in price shall have an effect upon competition as defined in the statute. You will recall that the earlier orders of the Commission specifically prohibited only such discriminations which had such an effect. However, this was before the *Morton Salt* case.

In *Morton Salt,* the Supreme Court in effect took the Commission to task for over-proving effect on competition, stating:

> "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence."

After this pronouncement from the Supreme Court, the importance of the effect point in secondary line cases is slight indeed.

In *Morton Salt* the Commission originally issued an order which required the Morton Salt Company in the sale of its table salt, *inter alia,* to cease and desist from discriminating as among wholesalers by selling any of such products to some wholesalers thereof at prices different than the prices charged other whole-

salers who in fact compete in the sale and distribution of such products. After respondent filed a petition for review in the Seventh Circuit, the Commission by stipulation of counsel, recalled the order and modified it as follows:

"Provided, however, this shall not prevent price differences of less than 5¢ per case which do not tend to lessen, injure or destroy competition among such wholesalers."

The Court refused to affirm the part of the modified order which read:

"Provided, however, that this shall not prevent price differences of less than 5¢ per case which do not tend to lessen, injure or destroy competition among such wholesalers."

The respondent objected to the last part of this clause on the ground that where a differential tends in no way to injure competition the Act permits it and that therefore the Commission must either find and rule that a given differential injures competition and then prohibit it, or it must leave that differential entirely alone. The Court dismissed this argument with the comment that only such differentials affecting competition were prohibited. However, the Court on its own initiative went beyond what the respondent requested and held that it was improper for the Commission to condition its approval of the 5¢ differential as it had on the differential not tending to lessen, injure or destroy competition. It held that to do so would be to transfer the fact finding function from the Commission where it belonged to the Courts, stating:

"The effective administration of the Act insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the Courts in subsequent contempt proceedings for their violations the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order."

On remand the Commission decided that no differential should be permitted and as a consequence *Morton Salt* lost its ability to have a 5¢ differential unless of course it could be cost justified or otherwise fall within an exception to the Act. It is significant to

note that this is precisely what the Commission had wanted initially and that the Supreme Court made it possible for the Commission to readopt this position.

The *Morton Salt* case had an important effect on the Commission's orders. Not since that time has the Commission issued an order in which it has made the effectiveness of the order depend upon the requisite effect upon competition. Under these circumstances what is the role of effect upon competition in interpreting a Commission order?

In the enforcement proceeding in *Standard Brands,* the Court refused to order enforcement where the Commission had proved in the enforcement proceeding effect at the primary level while the original proceeding had involved injury at the secondary level. My estimate is that apart from the situation found in *Standard Brands,* it will probably play no role in a court proceeding by the Commission to enforce an order or in a contempt proceeding. It will of course be applied by the Commission in its determination as to whether to move to enforce an order or move for contempt. Thus, the Commission would probably not act in the case of inadvertent violations of its order on the basis that such inadvertent violations did not have the requisite effect upon competition.

It is clear that although the current orders of the Federal Trade Commission do not refer to the cost justification proviso or the meeting competition defense, such defenses are implicit in every order just as if the order had set them out in *extenso.* In the *Ruberoid* case the Supreme Court disposed of arguments against an order which was in the form currently used on the ground that it did not save for respondent the defenses provided by the Act. In disposing of this objection the Court made the following points.

First, the Court clearly recognized that the statutory defenses, unlike the effect upon competition requirement, are implicit in the order even though not stated. Second, the Court recognized that it is not necessary for the seller to seek modification of the order before it meets a competitor's lower price or to lower a

price on the basis of cost justification. Third, the seller nevertheless retains the burden of proof of such justification. Finally, the seller may not relitigate issues already settled by the prior order either where the evidence was submitted and the decision was against the respondent, or where the information had been available and was not submitted to the Commission.

While such defenses are theoretically present in every order, the practical effect of such inclusion should not be over-rated. The Commission has yet to approve a defense based on meeting competition. To be sure, the Supreme Court has been somewhat more hospitable to the defense, twice deciding *Standard Oil* against the Commission on this ground. Similarly, while the Commission has recognized the cost justification defense to a somewhat wider degree, as in *Sylvania Products* and others, the Attorney General's committee concluded that the cost justification defense "has proved largely illusory in practice." The Supreme Court aptly commented in *Automatic Canteen* that "proof of cost justification being what it is, too often no one can ascertain whether a price is cost justified."

III

One of the earliest cases involving injury in the primary line of commerce was *FTC* v. *E. B. Mueller.* In this case the respondent reduced the price of its chickory below cost and below its competitor's price in New Orleans where it had a single competitor with demonstrated injury to that single competitor. The Commission's order in effect required respondent to sell to all purchasers to whom it sold in the United States at the same price. The language used was to restrain respondent "from selling any material quantity of its products to purchasers in one or more general trade areas at prices different than those to purchasers in any other trade area." For all that the record disclosed, *Mueller* had before the occasion of the activities in New Orleans been selling its chickory in all areas of the United States in which it did business at the same price. Consequently the order did not materially change the pre-existing situation.

A more recent litigated case involving primary line injury is *Maryland Baking Company*. Here the respondent had reduced the price in Washington, D. C. on a particular type of ice cream cone about 25%, while maintaining higher prices in other areas in which it did business. It had only one competitor in Washington, D. C. and the avowed purpose of the price reduction according to the Court was to drive the single competitor out of business and in fact the price reduction was far below its competitor's price and had the effect of depriving the single competitor of its normal channel of distribution through jobbers with a consequent loss of about one-half its volume of business in the product in question. The order entered by the Commission would have prohibited the respondent from "selling ice cream cones to any purchaser at higher prices than the prices charged any other purchaser engaged in the same line of commerce where, in the sale of said cones to such purchaser charged the lower price, respondent the *Maryland Baking Company* was in competition with another seller."

The effect of this order would have been to preclude *Maryland Baking* from charging any lower price for its ice cream cones in any area in which it had competition than it charged in any other area. Conversely the order would have precluded *Maryland Baking* from charging any higher price outside Washington, D. C. than it charged in Washington, D. C. where it had competition from the single competitor. On the argument before the Fourth Circuit Court of Appeals, the Court although brushing aside argument with respect to lack of effect of the price discrimination noted its displeasure with the order which would have placed the Company in a complete straight-jacket so far as pricing its product was concerned. Thereupon, the Commission revised its order materially so as to provide that the respondent was prohibited only from

> "selling ice cream cones to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same line of commerce, where such lower price undercuts the price at which the purchaser charged the lower price may purchase ice cream cones of like grade and quality from another seller."

The Court noted that it interpreted the order as thus changed not to require uniform prices throughout the country nor to forbid the company making prices in good faith to meet competition.

The *Maryland Baking* type order has been adopted by the Commission in a number of subsequent cases involving consent orders, namely, *Amalgamated Sugar Company, Borden Company* and *Sylvan Seal Milk* and *Arkansas City Cooperative Milk Association, Inc.*

The next litigated case which I wish to discuss is *Anheuser-Busch,* with which I am somewhat familiar. This case involved the following set of facts. Anheuser-Busch's Budweiser beer is sold throughout the country. It is in competition in various markets with other beers which are nationally sold, such as Schlitz, Miller, Pabst and Blatz, as well as with a number of much larger selling regional beers, such as Rheingold, Ballantine, Schaefer, Piels in New York, Falstaff and Hamms in the Midwest, etc. In some areas, Budweiser is sold substantially above such regionals, while in a large number the differential between Budweiser and important regionals is less than 15¢ a case. In the latter part of 1953, after a very small price increase on Budweiser which was not followed by many of its regional competitors, although they, too, had the same cost increases due to a labor contract, Anheuser-Busch's sales fell off drastically on a national basis. In an effort to increase its sales in St. Louis, its home market, where it had not increased the price but where it had a very small percentage of the sales and was in last position, Anheuser-Busch decreased its price by 25¢ a case which left a differential between it and its St. Louis competitors of 33¢ a case. This reduction was put into effect January 1, 1954 and resulted in little change in sales, since the price change was not reflected at the retail level. During the first part of 1954 its national sales position continued to deteriorate and in June 1954 it reduced the price in St. Louis to the price of its competitor Falstaff who held the lion's share of the market. During the period of the price reduction Anheuser-Busch's sales of Budweiser increased in St. Louis but at all times

its sales were roughly comparable to those of Falstaff. The price reduction remained in effect for seven months, at which time Anheuser-Busch raised its price 45¢ whereupon the competitors raised theirs 15¢, leaving a differential of 30¢. At the same time Anheuser-Busch put out a new brand which sold at the prevailing popular market price. The Commission's original complaint requested an order which was in the terms of the original order in the *Maryland Baking* case. The effect of this proposed order attached to the complaint would have been to require Anheuser-Busch to sell Budweiser at the same price all over the United States. In the defense of this proceeding, Anheuser-Busch demonstrated that beer pricing was determined on an individual market basis. Varying costs, taxes, freight rates, and different competitive circumstances required different prices in different markets. Moreover, it was demonstrated that in the beer business, unlike other businesses, there were various gradations of prices in individual markets. For example, in many markets there are more than a dozen beers sold in the market at four or five different levels of prices.

At the conclusion of the hearing, Commission counsel requested an order which would have required Anheuser-Busch to reduce its prices in all areas by the same percentage whenever Anheuser-Busch reduced in any "consequential amount" the "theretofore existing differential" in price between its product and other competing sellers. The Examiner, although holding against Anheuser-Busch on the merits, refused to take this order, holding that the key word "consequential" was vague and indefinite and on the record varied so from market to market as to have no meaning. He also held that the words "theretofore existing differential" were incapable of definite ascertainment. The Examiner therefore issued an order which would have prohibited a price reduction in any market unless Anheuser-Busch likewise reduced its prices everywhere by the same percentage.

The Commission changed the order—in words at least. It prohibited "a price reduction in any market where respondent is in

competition with any other seller, unless it proportionally reduces its price everywhere for the same quantity of beer."

This order would have the following effects. Since Anheuser-Busch is in competition with some other brewer in all markets of the United States, the effect would be to prohibit the reduction in any market unless it makes a proportionate reduction in all markets. Parenthetically it is not clear what the word "proportionally" means. The Commission used it in place of the word percentage which had been used by the Examiner to, in the words of the Commission, avoid possible rigidity of interpretation. However, the manner in which it accomplishes this matter of avoiding rigidity of interpretation is far from clear.

One effect of the order as drafted would be that if Anheuser-Busch reduced the price in one market even to a point well above its competitors, it would have to reduce the price in some other markets to a price below a number of its competitors in order to comply with the order. For example, the first price reduction in St. Louis of 25¢ was a reduction of 8.5%. The Commission did not claim that this reduction caused any injury to competition. However, the difference in price between Budweiser and a regional beer in one-fourth of all markets in which Budweiser sells is less than 15¢ a case. In every one of those markets an 8.5% reduction would bring the price of Budweiser below that of regional beer.

Another effect of the order would be that it would prevent necessary adjustments to local situations. There are frequent changes in tax rates imposed on beer in states and localities which require downward adjustments in price by the brewer in order to preserve the opportunity for wholesalers and retailers to sell at what are termed realistic prices. The record in this case disclosed an example in Texas in 1955 when the tax on beer was increased. The tax was imposed on wholesalers. It was found by Anheuser-Busch that the relatively small tax increase if reflected by wholesalers with a customary mark-up in the price to retailers would narrow the retailers' margin to a point where the retail-

ers price of beer would be increased. Since over the bar prices are normally increased in increments of 5¢ a bottle, or $1.20 a case, this would have completely disrupted the relationship existing between the retail price of Budweiser and the retail price of regional beers. In the case of the regionals the tax increase was smaller in size and could be passed on without major adjustment in the retail price. Anheuser-Busch decided to absorb the tax increase and lowered its price in Texas to do so. This left the consumer price the same. The order would prohibit such readjustment unless downward adjustments were made at all other places where no similar tax increase required the adjustment.

Moreover, the order, while phrased in terms of prohibiting reductions in price, effectively prevents any raising of prices. Let us suppose that costs of delivery, etc., in a certain area required an increase in price and that prices are increased. If thereafter volume falls off, Anheuser-Busch could not reduce prices in order to regain the volume unless it reduced elsewhere proportionally.

Finally, the whole order is based on a premise which is demonstrably unsound. The premise is that a product which at one time can be sold in satisfactory quantities at somewhat higher prices in some markets, may always be sold at such higher prices. However, the facts are contrary. A change in a competitor's advertising program may well render the differential completely obsolete. If there is no such change in the competitive situation in another market, there will be no need for a change in prices. Despite these facts, the Commission's order would freeze into perpetuity the relationship between Anheuser-Busch prices in different markets on the day the order became effective, although under normal circumstances that relationship would otherwise be completely fluid as costs and competition changed in various markets.

The Anheuser-Busch order was set aside by the Court of Appeals for the Seventh Circuit but not on the ground that the order was too broad. In fact the Court disposed of the case on the ground that Section 2(a) of the Clayton Act did not cover a situation in which a seller was normally selling at different prices in different markets and merely reduced prices non-discrimi-

nately to all purchasers in one market. They held that this conduct if cognizable at all was cognizable under Section 3 of the Robinson-Patman Act which specifically adverts to reductions in price for the purpose of destroying a competitor. The Court specifically did not reach the alternative arguments with regard to lack of effect on competition or the defense of meeting competition and it did not discuss the order.

A trial examiner of the Commission has entered a similar order in the *Pure Oil* case. The *Pure* case arose out of a situation which is quite prevalent throughout the United States in the gasoline business. Over the past few years there have developed in various parts of the country a large number of private brand sellers of gasoline. These private brand sellers have developed their business on the basis of selling 2¢ below the price at which the more or less name brands sold. Also, the private brand sellers customarily have included various gimmicks in their selling, such as giving away dishes, etc., on the purchase of the required amount of gasoline. The Commission apparently takes the position that it is a violation of the Robinson-Patman Act for an oil company to take any action to alter the situation so far as the 2¢ differential is concerned. In the *Pure* case the Pure Company apparently suggested to its dealers in Birmingham, Alabama that they would do better in competing with private brand sellers to price their gasoline so as to be 1¢ above rather than 2¢ above. The action of the *Pure* dealers who followed this suggestion triggered a price war when the majors reduced their prices similarly and the private brands reduced in order to maintain their 2¢ differential. Although the evidence in the *Pure* case is that Pure's position did not materially change in the Birmingham market, the Examiner has issued an order which would in effect require Pure to maintain its present prices all over the United States. The only way it could reduce in any one market is by proportionally reducing everywhere else at the same time. The effects of such an order on Pure would be much the same as those discussed previously with respect to Anheuser-Busch. If the Commission prevails in other pending cases against other oil com-

panies, the result would be that the private brand operators are completely protected from competition from the majors—they would compete pricewise only among themselves. How this can be squared with the philosophy of the Sherman Act, I am unable to perceive.

IV

At present, §11 provides that an FTC order under the Clayton Act is enforcible against a respondent by contempt proceedings only if the order has been enforced by a judgment of a court of appeals. Under the *Ruberoid* decision, the FTC may petition for such enforcement only after finding a violation of its pre-existing order.

The Commission has never moved to punish a respondent for contempt for violating an order which has been enforced. Moreover, it has moved to enforce, so far as my research indicates in only two instances. The first instance was in *Federal Trade Commission* v. *Standard Brands,* in 1951 in the Court of Appeals for the Second Circuit. The second instance was in *Federal Trade Commission* v. *American Crayon* in the Sixth Circuit, which ran a somewhat checkered course—it went up to the Supreme Court twice before an enforcement order was issued. However, this should not be taken to mean that other enforcement activities may not be in prospect. A Congressional Committee has reported that at the present time, more than 80 outstanding Clayton Act orders are under active study by the Commission to determine compliance.

A pending bill, Senate 726, which has passed the Senate and is now before the House Judiciary Committee, would amend §11 in the following respects:

1. It provides that FTC orders, under the Clayton Act, like FTC orders under §5 of the FTC Act, would become final and enforcible as specified in the order of the Commission, to be stayed only by petition to review the order in the appropriate Court of Appeals.

2. A civil penalty of not more than $5,000 for each violation, with each day of continuing violation to be considered a separate violation, is provided.

3. Findings of the Commission are to be sustained if supported by *evidence,* as distinguished from the present §11 which provides such findings must be supported by "substantial evidence."

The problems created by the broad FTC orders, the existing uncertainties with respect to the meaning of the cost justification and meeting competition provisos, and the new statute are difficult indeed.

The change from the "substantial evidence" to mere "evidence" test may or may not be meaningful. The Administrative Procedure Act provides that "evidence" is to mean "substantial evidence." However, who can guarantee that the courts will so interpret it, when the test is changed in a subsequently enacted act.

The automatic enforcement of price orders is more serious. Under present procedure, the practice is that a compliance report is negotiated with the FTC attorneys. This is made possible because the alternative to the FTC is an investigation, hearing and petition to enforce in the Court of Appeals. To amend the statute would mean the end of negotiation as the FTC negotiations would hold all the high cards.

This is particularly true when the possible penalties for violation of an order would be as drastic as envisaged in the amendment. A penalty of $5,000 a day for each individual price violation is completely unreasonable under a statute where there are so many open questions. After more than twenty years of Robinson-Patman, the precise meaning of neither the meeting competition nor cost justification provisos has been decided by the Supreme Court. Under these circumstances, it seems doubtful public policy to provide such abnormally heavy penalties for a wrong guess by a businessman or, I might add, his counsel.

The Practice of Lawyers and Accountants in the Field of Taxation

A LAWYER'S VIEW OF THE JOINT STATEMENT

By SEYMOUR J. WILNER

This subject has been a matter of contention between the legal and accounting professions for several years. The contention, often spirited, at times has been rather acrimonious. Perhaps we should not expect to achieve unanimity of opinion. But as members of learned professions we should be able to discuss the subject with intelligence and gentlemanly patience even though complete objectivity may not be attainable. It is submitted that the starting point of our discussion should be the public interest. That is not entirely altruistic for, economically, the public interest determines professional prosperity and, indeed, our very survival.

The public policy of the State of New York is set forth in Article 24 of the Penal Law, particularly Sections 270 and 271, which make it a crime for anyone other than a licensed attorney to practice law in the State of New York. In *People* v. *Alfani,* decided by the Court of Appeals in 1919 (227 N. Y. 334), it was held that practicing as an attorney-at-law, either in or out of court, or holding oneself out as entitled to so practice, without having first been duly and regularly licensed and admitted to practice in the courts of record of this state, is a violation of the Penal Law. As far as the writer knows, every state of the Union has similar statutes. The reason behind this public policy was very well stated in the case of *Auerbacher* v. *Wood,* decided by the Court of Errors and Appeals of New Jersey in 1948 (142 N. J. Eq., 484, 486), where the Court said:

> ". . . the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law."

The public policy of our state has also been enunciated by statutes applicable to the profession of certified public accounting. No one may engage in the public practice of accountancy as a certified public accountant or hold himself out to be engaged in such practice or use any deception which is designed to mislead the public into believing that he is qualified and registered as a certified public accountant, without violating the laws of this

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Editor's Note: Mr. Wilner has served on the Association's Committees on Unlawful Practice, City Court and Courts of Superior Jurisdiction. This article is the substance of his address to a joint meeting of the Tax Section of the Westchester County Bar Association, of which he is Chairman, and the Westchester Chapter of the New York State Society of Certified Public Accountants.

state. Section 7408 of the Education Law of New York brands such conduct as a misdemeanor, the same degree of criminal conduct prescribed by the Penal Law for unlawful practice of the law. The field of certified public accounting is defined, its qualifications are set forth and its regulation is provided by Article 149 of our Education Law. Thus, certified public accountants of our state have precisely the same interest in protecting the public and in protecting themselves in the practice of their profession as we lawyers have in preventing and prosecuting the unlawful practice of the law.

Regrettably, until the last session of our state legislature, the State of New York only regulated the practice of *certified* public accounting. There was, until this year, nothing in the statutes of our state which prevented any person, literate or illiterate, from holding himself out and practicing as an accountant or auditor. By Chapter 718 of the Laws of 1959, New York State has taken a great step forward in regulating the public practice of accountancy. Article 149 of the Education Law has been amended to provide for the enrollment and registration of all public accountants. After April 1, 1960, it will be a misdemeanor for any unenrolled person to hold himself out as engaged in public accounting or to use a title falsely indicating a right to so practice. Those presently engaged in public accounting may enroll and be registered. No examination is either necessary or provided. Unfortunately, that takes in the competent and the incompetent together. But there will be no additions to these ranks. While those engaged in public auditing on July 1, 1959, may continue, if they enroll, they will die out in time and, in the future, examinations will only be given for certified public accountants.

Suffice to say here, it completely avoids the issue for any of us to discuss the practice of tax law as being something outside the practice of law merely because it is engaged in by a certified public accountant. The point is that if a C. P. A. can practice law, so can any accountant, qualified or not. Viewed in that light we should be able to take a more objective view of the question of whether a particular type of practice or whether any particular conduct does or does not constitute the unlawful practice of the law.

Now let us look at another question of public policy, this time at the federal level. Under our self-reporting system imposed by the Internal revenue Code for income taxation, it is important and the Treasury Department recognizes it as being of great importance that all taxpayers should have readily available to them the opportunity for advice and assistance in the preparation of their tax returns. Advice and assistance should also be readily available to all taxpayers on the examination of their returns by the Internal Revenue Service. A lawyer or a C. P. A. may obtain a Treasury card enrolling him as a practitioner before the Internal Revenue Service without an examination. Last year the Treasury Department revised Circular 230 which deals with the qualifications to practice before the Internal Revenue Service. Under this revision it will now be possible for persons not professionally qualified to pass an examination easier than that heretofore given and, upon meeting certain educational and experience requirements, they can be enrolled to practice at all levels of the Internal Revenue Service.

The contention sometimes has been made, though nothing in the statutes or case law of New York lends it any support, that only lawyers should be permitted to prepare tax returns or to represent taxpayers before the Internal Revenue Service. In any event, regulation of persons practicing before the United States Treasury Department and its Internal Revenue Service is for the federal government, not the states.

Thus far there is nothing much to argue about. Now let us look at a real bone of contention. It is created by those persons who hold themselves out as "tax consultants," some of them certified public accountants and others not, who assume to advise with regard to tax law, independent of the preparation or audit of a return or the audit of the taxpayer's books. That was the situation in the Bercu case. (*New York County Lawyers' Ass'n* v. *Bercu*, App. Div. First Dept. 1948, 273 App. Div. 524, aff'd 299 N. Y. 728.) There are some accountants who disapprove of that decision.

In the Bercu case the accountant was not the taxpayer's auditor. Neither was he engaged with respect to the preparation or examination of the taxpayer's returns. His advice was given prospectively with regard to the corporate income tax and excess profits tax consequences to an accrual basis taxpayer of a contemplated settlement of claims for New York City sales and compensating use taxes applicable to business done in earlier tax years. Presiding Justice Peck's opinion states that "We have heard no proposal that accountants be ousted from the income tax field. * * * a taxpayer may, if he wishes, leave the entire preparation of the tax return to his accountant, legal incidents included, without the necessity of engaging a lawyer. * * * When, however, a taxpayer is confronted with a tax question so involved and difficult that it must go beyond its regular accountant and seek outside tax law advice, the considerations of convenience and economy in favor of letting its accountant handle the matter no longer apply, and considerations of public protection require that such advice be sought from a qualified lawyer."

In the writer's opinion the Bercu decision need raise no fear that an accountant may not accept an engagement only to represent the taxpayer on examination of the return even though he did not prepare the return or audit the books. That fear has been expressed by some accountants, apparently because of the following language in the opinion: "The accountant serves in setting up or auditing books, or advising with respect to the keeping of books and records, the making of entries therein and the handling of transactions for tax purposes and the preparation of tax returns." The representation of the taxpayer on audit of the return is absent from that narration. However, later in the opinion it is said: "We are unable, therefore, to regard the admission of accountants, subject to certain qualifications and regulations of the Treasury Department and the Tax Court, to practice before those agencies, as an authorization to accountants to practice tax law at large or as an eradication of the distinction between the lawyer's and the accountant's function in the tax field." An accountant is not practicing tax law "at large" if he is representing the taxpayer on the audit of the tax return. So long as the Internal Revenue Service permits an accountant to represent

a taxpayer on audit, even though he did not prepare the return, that service is part of the accountant's function in the tax field and the Bercu decision does not stand in the way.

All lawyers are not experts in the tax field. Neither are all accountants, not even all certified public accountants. Several of our most respected firms of certified public accountants have their tax departments to which they require the referral of all tax questions which arise in the course of their work. It is not uncommon for them to employ lawyers in their tax departments. Many lawyers in general practice consult accountants on tax questions. Neither of our professions recognizes taxation as a specialty. If we should ever do so it will be necessary to set up qualifications and limits for its practice and that would raise a conflict with Treasury Department policy as expressed in Circular 230. It suffices for our purposes to recognize that within our respective professions there are varying degrees of competence in many fields, taxation among them. Neither profession should sink to the level of the least qualified among us. Neither profession may alter its essential status and functions by virtue of the best qualified among us. The public policy that confines the practice of law to the lawyer and the practice of certified public accounting to the C. P. A. is founded primarily in the public interest and, whether or not a few among us disagree with it, the law requires observance by all of us.

Following in the wake of the Bercu decision the attention of both of our professions was focused on our differences. A case was decided in California in 1954 which went considerably further than the opinion in *Bercu*. The California court decided that the preparation of a tax return by an accountant is permissible but that this does not permit him to seek a refund or advise his client as to difficult or doubtful legal questions that may arise. (*Agran* v. *Shapiro*, 127 Cal. App. 2d 807, 273 P. 2d 619.) Compare that with the statement in Presiding Justice Peck's opinion in the Bercu case that "a taxpayer may, if he wishes, leave the entire preparation of the tax return to his accountant, legal incidents included, without the necessity of engaging a lawyer." It would thus seem that the accountant's latitude in New York is considerably greater than in California. In *Gardner* v. *Conway*, a Minnesota case decided in 1951 (234 Minn. 468, 479, 48 N. W. 2d 788, 795) it was said that "Any rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare." Earlier, in *Lowell Bar Ass'n* v. *Loeb*, a Massachusetts case decided in 1943 (315 Mass. 176, 52 N. E. 2d 27), it was held that an accountant must apply a working knowledge of some areas of law to function as an accountant but he may not lawfully perform any service that lies wholly within the practice of law. This is the New York view as expressed in *Bercu*. Of course, accountants cannot legitimately complain of a rule that excludes them from performing any service "that lies wholly within the practice of law"—what presents the difficulty is determining what is wholly within the practice of law and what is within the area legitimately occupied by both professions.

In 1951 the National Conference of Lawyers and Certified Public Accountants approved a Statement of Principles for the guidance of members of both professions and that same year it was approved by both the American Bar Association and the American Institute of Accountants. (III Martindale-Hubbell Law Directory, 116 A, 1959.) That statement recognizes, in the public interest, the proper functions of both professions in the tax field.

Early this year the Executive Committees of the New York State Bar Association and of the New York State Society of Certified Public Accountants approved a Joint Statement Relating to Practice in the Field of Taxation.* Significantly, it states that both Associations "concur in and ratify" the Statement of Principles adopted in 1951 by the National Conference. Thus, we are not confronted by a new code. What the Joint Statement gives us is a ratification, for our guidance in New York State, of the Statement of Principles adopted eight years ago by our national associations.

The Joint Statement does not change the rule of the Bercu case. It is not an erosion of the prohibitions of the Penal Law of New York. It does not change anything that was said by the Court of Appeals in *People* v. *Alfani* (*supra*, 227 N. Y. 334). Only a lawyer may practice law and there is no special dispensation for the accountant by virtue of his certification.

What the Joint Statement does do is to reaffirm that only the lawyer may practice law and the certified public accountant "may properly advise as to the preparation of financial statements included in reports or submitted with tax returns or as to accounting methods and procedures." It elaborates upon this as follows:

> "In other areas it is settled that certain matters are within the competency of both professions. This is true for instance in the preparation of federal income tax returns, although it is recognized by both professions that if a substantial question of law or accountancy arises in the preparation of a return, it should be referred to a member of the appropriate profession.
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> "In the large areas in the tax field where the legal and accounting aspects are interrelated and overlap, it is often in the public interest that the services of both professions be utilized. Indeed, experience has shown that a lawyer and a certified public accountant working together on behalf of a common client in the tax field constitute a very effective team. When the lawyer and accountant have joined hands in the preparation and presentation of a case before the Internal Revenue Service, the taxpayer is most effectively represented. It is not intended, of course, that the services of both a lawyer and a certified public accountant need be utilized in matters which do not involve uncertainties as to legal or accounting questions or in matters of minor significance particularly where litigation is not indicated.
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> "The services of a lawyer should be obtained in connection with the organization of corporations, effecting corporate reorganizations, the creation of partnerships and trusts, the setting up of pension and

* See McKinney's Judiciary Law, p. 219 (Pocket Part).

profit-sharing trusts and the like, since in these matters there are involved not only very complex statutes but also substantial non-tax legal problems under State law. On the other hand, the services of a certified public accountant should be obtained in connection with the accounting problems and effects of the organization and reorganization and development of corporations, partnerships, and trusts, including pension and profit-sharing trusts; with the accounting problems involved in income determination, such as questions relating to operating losses, earnings and profits, surplus accumulations and the like; and in those matters requiring the experience and training of the certified public accountant in the fields of financial and operational planning."

The Joint Statement refers to the "intricacies of both our federal and state tax systems," yet it affirms only that the "preparation of federal income tax returns" is within the competency of both professions. Perhaps the Committees of both Associations could not agree as to whether members of either profession may properly prepare New York income tax returns. It is not supposed that the accountants would insist on a right to prepare estate tax returns except under the supervision of a lawyer, although the Joint Statement makes it clear that only an accountant may properly advise as to the preparation of financial statements submitted with tax returns. That necessarily includes in the accountant's function the financial statements required with estate tax returns as to a decedent's business interest. How about gift tax returns? The Joint Statement does not mention them. The Joint Statement is designed to encourage closer cooperation between the two professions. While not presuming to dispose of all problems that may arise, a line of demarcation has been enunciated upon which the negotiators for both professions were able to agree.

When the Statement of Principles was approved eight years ago it contained the modest admission that it was tentative. The Joint Statement does not enlarge it except to provide specific procedure for the amicable solution of controversies in a "Joint Practice Committee of Lawyers and Certified Public Accountants" for New York State. We still have a considerable distance to travel on our road to peaceful co-existence. This does not minimize the accomplishment. At very least, what Presiding Justice Peck wrote in 1948 in the *Bercu* case has now received intellectual acceptance from both of the professions to whose problem his reasoning was addressed.

Most noteworthy is the recognition of the practical effect in tax cases of the rule that a client's communications to his lawyer are privileged while those to an accountant are not (Civil Practice Act, secs. 353, 354). This stems, of course, from the difference in professional obligations. A lawyer's loyalty to his client alone is the proudest possession of the American Bar under our rule of law. The accountant's duty is primarily one of impartiality, since creditors, investors and others customarily rely on the auditor's report in the market place. The accountant's testimony, his reports and his worksheets may be subpoenaed, but a confidence reposed in a lawyer by his client remains forever inviolate.

Last year a sub-committee of the American Bar Association's Committee on Professional Relations prepared a draft of a proposed code of conduct for lawyers and certified public accountants who practice in association and for individuals possessing dual qualifications. It was submitted to the National Conference of Lawyers and Certified Public Accountants for consideration and, as yet, no action has been taken on it. The text of the draft was published in the October, 1958, Bulletin of the American Bar Association's Section of Taxation and is well worth our careful consideration. It goes a long way toward resolving some very vexing problems such as, the lawyer employed by a firm of certified public accountants, the certified public accountant employed by a law firm, partnerships between lawyers and certified public accountants and the individual who possesses dual qualifications. At the root of the problems presented under these headings is the solicitation of business through publicizing of qualifications, a practice which violates the ethical concepts of both of our professions. It may not be amiss to note that our foremost firms of lawyers and certified public accountants for sometime have been meticulously observing the ethical considerations mentioned in the proposed code. It is always wholesome to note genuine leadership in our leaders, the professions included.

There is another side to this coin. The Statement of Principles and the Joint Statement stress their objective of promoting collaboration between our professions, primarily toward providing the public with the professional competence required in the intricate field of taxation. Every profession has its incompetents. It is the writer's observation that those who are not amenable to cooperative endeavor are the insecure. The lawyer or accountant laboring under the burden of his own inadequacy cannot collaborate for fear of exposing himself. He is distrustful and secretive not because of pride but through fear. No statement of principles will bring him voluntarily to the conference table nor deter him from resisting collaboration to the detriment of his client's interest and, inevitably, his own best interest. He prefers to deal with the client alone. He resents another professional man earning a fee. He raises every possible obstacle to the teamwork which the Joint Statement encourages. Note that the jurisdiction of the Joint Practice Committee is limited to disputes "in which it is alleged that a lawyer is or has been practicing accountancy or that a certified public accountant is or has been practicing law." There is no jurisdiction in the Joint Practice Committee over a refusal to cooperate. The client is left to figure out his own salvation but who among us enjoys bringing such a complaint to the client? It would seem that the only effective answer to this problem is the raising of standards for a professional license. Meanwhile our professional associations can only stress our programs of continuing professional education.

Enough about our differences. Some observations may be in order about the problems we share in common. Note that the Joint Statement is a guide only for lawyers and certified public accountants. It has no reference to practice, either permissible or unauthorized, by the uncertified accountants. The so-called "auditors," "tax consultants" and what else have been free to advertise by any means they choose. We have seen their huge signs in store

windows and their sandwich men parading the streets around the Internal Revenue offices. After April 1, 1960, that situation should end for the new Article 149 of the Education Law prohibits unprofessional advertising by enrolled public accountants (sec. 7406). We have also seen the advertisements of the estate planners, the pension trust planners and others, all merchandising their wares in a package with tax law and accounting advice. The sooner we compose our own differences and get on to our common problems, the better for both professions.

It seems safe to predict that, upon mature reflection, both of our professions will generate a very considerable enthusiasm for the cooperation which the Joint Statement encourages. In that connection it is submitted that we might take an objective look at Section 276 of our Penal Law and Canon 34 of our Canons of Legal Ethics, which prohibit the sharing of fees with non-lawyers. It may be that appropriate amendments are in order to encourage the sharing of fees, particularly the contingent portion of fees, between lawyers and certified public accountants in tax matters.

To sum it all up (our C. P. A. friends might indulge a lawyer to do this simple addition), we can solve our own economic problems only as we improve our service to our clients. They need lawyers and they need certified public accountants. The man who tries to be both is neither. As members of learned professions we should be able to benefit by the Joint Statement's line of demarcation between our functions and its delineation of a cooperative, peaceful path to a more effective and a more rewarding professional life, in the interests of both the public and ourselves. We teach our clients. Maybe we can teach each other and ourselves!

The 1958 Geneva Conventions on the Law of the Sea

A REPORT OF THE COMMITTEE ON INTERNATIONAL LAW

INTRODUCTION

On September 15, 1958, the United States signed four international conventions on the law of the sea relating to the territorial sea, navigation on the high seas, fishing on the high seas and the continental shelf.[1] Also approved were a protocol which provides for judicial settlement of disputes arising out of the four conventions and a number of related resolutions.[2] These agreements and the optional protocol must now be ratified by the President with the advice and consent of the Senate in order to become binding international commitments of the United States.

The Conventions represent the work of an outstandingly well prepared international conference which met in Geneva from February 21 to April 27, 1958, and was attended by the representatives of eighty-six nations.[3] The conference was convened pursuant to a resolution adopted by the General Assembly of the United Nations in February, 1957, to examine the law of the sea, taking account not only of the legal, but also of the technical, biological, economic and political aspects of the problem.[4] In calling for the conference, the General Assembly had acted on a recommendation of the International Law Commission of the United Nations. The Commission had been considering different aspects of the law of the sea since 1949, and in 1956 summarized its work in a series of seventy-three draft articles.[5]

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1 *Convention on the Territorial Sea and the Contiguous Zone* (U.N. Doc. A/Conf. 13/L. 52); *Convention on the High Seas* (U.N. Doc. A/Conf. 13/L. 53); *Convention on Fishing and Conservation of the Living Resources of the High Seas* (U.N. Doc. A/Conf. 13/L. 54; and *Convention on the Continental Shelf* (U.N. Doc. A/Conf. 13/L. 55). The Conventions are also reproduced at 52 American Journal of International Law 834–862 (October 1958).

2 *Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes* (U.N. Doc. A/Conf. 13/L. 57); and *Resolutions Adopted by the Conference* (U.N. Doc. A/Conf. 13/L. 56). These are also reproduced at 52 American Journal of International Law 862–867 (October 1958).

3 The Chairman of the United States delegation was Arthur H. Dean of New York City. His estimate of the accomplishments of the Conference appears in Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 American Journal of International Law 607 (October 1958).

4 Resolution 1105 (XI) of February 21, 1957. U.N. General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/3572).

5 *Report of the International Law Commission*, U.N. General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159).

In preparing the draft articles the International Law Commission had to take account of fairly substantial diversity of opinion among governments on certain points. For example, on the subject of the breadth of the territorial sea, the United States and other maritime nations have maintained that the breadth is three miles. Some Latin American nations, on the other hand, have claimed two hundred miles of territorial sea or at least of exclusive fishing rights, while still other nations have claimed territorial seas of six, nine or twelve miles. Reflecting these differences, the International Law Commission also failed to agree on any fixed limit for the breadth of the territorial sea. Instead it stated in its report that international practice is not uniform, but that international law does not sanction a limit in excess of twelve miles.[6] It also pointed out that on the one hand many states had fixed a limit in excess of three miles, but that, on the other hand, many other states do not recognize such limits if they exceed their own.

In spite of the diversity of opinion on this and some other points, the Commission in its report noted that: "There has been widespread regret at the attitude of Governments after the Hague Codification Conference of 1930 in allowing the disagreement over the breadth of the territorial sea to dissuade them from any attempt at concluding a convention on the points on which agreement had been reached. The Commission expresses the hope that this mistake will not be repeated."[7]

In the light of these long standing disagreements it came as no great surprise when the Geneva Conference failed to agree on the breadth of the territorial sea and deferred the problem to a later conference. It came as a considerable surprise, however, that the conference was able to muster the necessary two-thirds majority votes for the four conventions which were approved. These conventions establish new law on a number of important matters not previously regulated by international law, such as the conservation of fishing on the high seas, certain aspects of the rights of coastal states in the continental shelf, and the rights of landlocked states to have access to the high seas.

It is the aim of this report to summarize briefly these and some of the other salient features of the conventions.

I. THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

The United States has strongly opposed recent claims of many nations to territorial seas in excess of the three miles, unless such claims were based on historical usage, as in the case of Norway's claim to a territorial sea of four miles. Under traditional principles of international law a state has sovereign rights in its territorial sea. This means that nationals of one state have no right to fish in the territorial sea of another state. It also means that the right of foreign ships to navigate through the territorial sea is limited to the

[6] Id. at 12–13 (Commentary on Art. 3).

[7] Id. at 4, paragraph 30.

right of innocent passage and that foreign airplanes have no right to fly over the territorial sea unless authorized by treaty.

The close connection between fishing rights and the breadth of the territorial sea is indicated by the fact that many of the states which recently extended their claimed territorial sea did so in order to be able to exclude foreign fishermen. The International Law Commission had attempted to deal with the problem by giving coastal states special rights with respect to conservation of fish in areas of the high seas adjacent to the territorial sea. (These articles as adopted by the Geneva Conference are discussed later in this report.) However, in spite of this suggested solution, the claims to wider territorial seas have persisted.

At Geneva it became evident that no agreement on a limit of the territorial sea would be achieved without compromise as hardly more than twenty of the seventy-three coastal states at the conference adhered to the three mile rule.[8] The Conference was still hopelessly deadlocked on this issue after approximately a month of debate when the United States came forward with its proposal whereby the territorial sea would be extended to six miles, with exclusive fishing rights in the coastal state for an additional six miles.[9] The additional six miles were to remain subject to historical fishing rights of other states if they had previously fished those waters for at least five years. While generally acclaimed as a statesmanlike proposal to reconcile maritime and coastal interests, the compromise failed to muster the requisite two-thirds majority vote. It did, however, receive a majority vote of forty-five to thirty-three with seven abstentions. The General Assembly of the United Nations has already called for a new conference on the question to meet in Geneva in February or March of 1960.[10]

The Convention on the territorial sea and the contiguous zone generally reaffirms the traditional sovereign rights of a coastal state in the territorial sea. It also develops some new rules, which are outlined in the following paragraphs.

The Convention gives to a coastal state greater latitude than has until now been generally recognized in the use of a straight baseline. The baseline is a line near or along the coast from which the breadth of the territorial sea is measured. Normally the baseline is the low water line along the coast, but in exceptional situations a coastal state may use instead a straight baseline which does not follow the sinuosities of the coastline but connects headlands and islands along the coast. The use of a straight baseline increases the area of the territorial sea and correspondingly decreases the area of the high seas.

In the *Fisheries* case the International Court of Justice sanctioned Norway's use of a straight baseline because of the deeply indented coast combined with the presence of large numbers of islands along the coast and the

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[8] Sorenson, M. *Law of the Sea*, p. 243, International Conciliation, November, 1958. Mr. Sorenson was Chairman of the Danish delegation at the Geneva Conference.

[9] Dean, *op. cit. supra* at 614.

[10] Resolution 1307, of Dec. 10, (XIII) U.N. General Assembly, 13th Sess.

peculiar economic interests of the inhabitants of the coastal region.[11] Article 4 of the Convention follows this decision, although it authorizes the use of a straight baseline where the coast is characterized either by deep indentations *or* by a fringe of islands in the immediate vicinity. The Convention also states that economic interests of the coastal region may be considered, although such interests would not of themselves without the geographic factors constitute sufficient grounds for use of a straight baseline. To mitigate the effect of the extension of internal and territorial waters which would result from the use of a straight baseline, the Convention recognizes a right of innocent passage through internal waters which would be thus created.

Coastal states are also given more liberal treatment as regards the inclusion of bays in their internal waters. The problem with bays is to define the maximum width permissible at the entrance of a bay for the waters of the bay to remain internal waters. There is no right of innocent passage through internal waters as there is through the territorial sea and therefore such bays could be closed to foreign shipping. The Convention in Article 7 paragraph 4 extends to twenty-four miles the previously generally recognized maximum width of ten miles.

The Convention also formulates a new rule of innocent passage which bears upon the controversial issue of whether Israeli ships have a right to pass through the Strait of Tiran to and from the Israeli Port of Elath at the head of the Gulf of Aqaba, as against Arab claims that the Gulf of Aqaba lies entirely within their territorial waters. Article 16(4) of the Convention provides that there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas *or* the territorial sea of a foreign State. This new rule is based on the decision of the International Court of Justice in the *Corfu Channel* case, but goes beyond it in one important respect.[12] In affirming the right of British warships to pass through the strait formed by the North Corfu Channel, which lies entirely within Albania's territorial waters, the Court pointed out that the North Corfu Channel connected two parts of the high seas (the Aegean and Adriatic Seas) and that it had been used for international navigation.[13] The rule adopted at Geneva provides not only that innocent passage shall not be suspended through straits linking two parts of the high seas, which was the situation in the Corfu Channel case, but also that it shall not be suspended through straits linking the high seas and the territorial sea of another state, provided that in both situations the straits are used for international navigation.

The Convention fixes at twelve miles from shore the maximum area allowed for the existence of a contiguous zone. This is an area of water beyond

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[11] *Fisheries Case* (United Kingdom v. Norway), Judgment of December 18, 1951: I.C.J. Reports 1951, p. 116.

[12] *The Corfu Channel Case* (United Kingdom v. Albania); Judgment of April 9, 1949; I.C.J. Reports 1949, p. 4.

[13] Id. at 28.

the territorial sea in which the coastal state enjoys certain limited special rights, which the Convention enumerates as the regulation of immigration, customs, sanitation, and fiscal matters. (Art. 24). Apart from these special rights of the coastal state, the waters of the contiguous zone remain in every other respect part of the high seas. It will be noted that the existence of a contiguous zone presupposes a territorial sea of less than twelve miles.

II. CONVENTION ON THE HIGH SEAS

The Convention reaffirms the traditional freedoms of the high seas, namely, freedom of navigation, of fishing, of laying submarine cables and pipelines and of flying over the seas. (Art. 2). It also formulates a number of interesting new principles with respect to landlocked states, nationality of ships and pollution of the high seas, which are outlined in the following paragraphs.

A proposal was made at the conference to give landlocked states, such as Bolivia, Switzerland and Afghanistan, a right of innocent passage to the sea over the territory of adjoining states. This proposal, supported by the Soviet bloc, was opposed by the United States.[14] As a result, the article, as finally adopted, does not provide landlocked states with a right of innocent passage over the territory of their neighbors to the sea, but instead states that a right of free transit should be established by means of bilaterial agreement between the states concerned. (Art. 3).

The Convention has also formulated a new guilding principle for recognition of the nationality of ships. It provides that there must be "a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." (Art. 5). This requirement was aimed at the registry of ships by Panama, Liberia and also, but to a lesser extent, Costa Rica and Honduras. These four nations have a significant percentage of the world's tonnage under their flags, a large proportion of which is owned by United States nationals. The United States delegation had favored retention of the traditional view that the flag of registry determines the nationality of a vessel.

The problem of nuclear tests on the high seas prompted heated debate at the Conference. Although the arguments for and against the legality of such tests reflected the bipolarization of the cold war, there were also genuine expressions of concern over the tests which were not politically inspired.[15] A Soviet proposal which would have barred nuclear tests on the high seas was defeated, partly on the ground, advanced by India, that the Conference should not interfere with negotiations on the general problems of nuclear tests then being carried on in other bodies of the United Nations. The Convention did, however, adopt a new rule requiring states to take measures to prevent pollution of the high seas by radioactive waste. (Art.

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14 Dean, *op. cit. supra* at 628.

15 Sorenson, at 209, 210.

25). A similar provision was adopted in regard to pollution of the seas by oil from ships or pipelines or resulting from work on the continental shelf. (Art. 24). In both cases a state would be under the obligation to enforce such measures against ships flying its own flag, though presumably it would have no right of enforcement against ships of other nations.

III. THE CONVENTION ON FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS

A major accomplishment of the Geneva Conference was its adoption of new rules of international law with respect to the conservation of the natural resources of the sea.

United States policy with regard to fishing and conservation had been officially announced in the Truman Proclamation of 1945. There the United States expressly reserved the right to establish conservation zones for fish in the areas of the high seas contiguous to the coasts of the United States.[16] At the same time it recognized the rights of other states to establish conservation zones off their shores, provided that the fishing rights of United States nationals in those zones would continue to receive recognition. This proclamation, which was never implemented by the United States, was followed by claims of other nations staking out exclusive fishing rights over large areas of the high seas adjacent to their coasts. For example, in the Santiago Declaration of August 18, 1952, Chile, Ecuador and Peru asserted exclusive fishing rights over an area extending for 200 miles from their coasts.

The uninhibited Latin claims and the potential and actual international friction which they engendered rendered more urgent the need for a comprehensive system of international regulation. Also, as already noted, in many cases a state's claim for the breadth of the territorial sea was, if not due to security considerations or nationalistic assertions of newly won sovereignty, simply a means for asserting exclusive fishing rights. To remove some of these pressures for the extension of territorial seas, this Convention recognizes the special interests of the coastal state in conservation of fish in the high seas off its coast. (Art. 6).

The Convention provides that a state fishing in the area of the high seas adjacent to the territorial sea of another state shall at the latter's request negotiate with it conservation measures even though the coastal state does not itself fish in that area. It also provides that a state shall not enforce conservation measures in an area adjacent to the coast of another state if such measures conflict with those of the coastal state. Conflicting measures of conservation must be reconciled by negotiation within 12 months, and failing agreement by that time, may be submitted by either party for settlement by a special commission. In certain instances the coastal state is given the

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16 Presidential Proclamation No. 2668, September 26, 1945, 59 Stat. 885.

right to adopt unilateral measures of conservation in an area of the high seas adjacent to the territorial sea. (Art. 7).

The Convention further provides that in areas of the high seas which are not adjacent to the territorial sea of a coastal state, two or more states fishing the same stock must at the request of any one of them agree on conservation measures with which any new state entering the area must comply unless it can get the others to agree on new measures. (Arts. 4, 5). If the states fail to agree on joint conservation measures within a period of 12 months, any one of them may submit the dispute for settlement to a special commission. (Art. 4(2)). The Convention does not state how far out on the high seas a coastal state can exercise special rights over fishing, but, presumably, this issue would be subject to settlement by special commission, just as would be the failure to agree on conservation measures.

The Convention also leaves open the procedure to be followed for initiating and conducting negotiations on conservation measures. In a separate resolution, however, the Conference recommended that the regional commissions set up under existing treaties be used for such negotiations.[17]

An important feature of the scheme of regulation is the machinery for compulsory settlement of disputes by special commission. This is the only one of the four Conventions which has its own provisions for the settlement of disputes. The International Law Commission had stated that it could not propose "for states rights over the high seas going beyond existing international law" without also creating "effective safeguards for the settlement of disputes by an impartial authority."[18]

Any party to the Convention may request settlement of any dispute arising out of the failure to agree on measures of conservation or by implication, on the duty to negotiate such measures. (Art. 9(1)). A special commission of five shall be appointed by the parties but, if within 3 months they fail to agree on the appointments, either party may request that they be made by the Secretary General of the United Nations in consultation with the President of the International Court of Justice and the Director General of the Food and Agriculture Organization of the United Nations. The requirement that decisions must be rendered not later than 8 months after the appointment of the members of the Commission is a procedural improvement on international arbitrations which have been known to take as long as two to three years.

Another interesting feature of the settlement machinery is the authority of the Commission to stay enforcement of conservation measures pending the outcome of the proceedings, except in certain special situations. (Art. 9(1) and (2)). Courts, including the International Court of Justice, have exercised such power, but it has not commonly been one of the powers conferred on international arbitral tribunals.

Article 11 of the Convention states that decisions of the special commis-

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17 Resolution on *International Fishery Conservation Conventions*, adopted April 25, 1952.

18 Report of the International Law Commission, *op. cit. supra*, 33, par. 18.

sion shall be binding, and that recommendations accompanying a decision shall receive the greatest possible consideration. The report of the International Law Commission explains that this is intended to mean that the Commission may decide points in dispute, but may not issue new conservation measures unless requested to do so by the parties. It may, however, on its own initiative, recommend such measures.[19]

The Conference did not adopt the principle of abstention as suggested by the United States. This principle provides that if a particular fishing zone is under conservation management by a state, other states will abstain from fishing in that zone if the increased fishing would be likely to lead to a reduction in the stock of fish.[20] Many nations, particularly newly sovereign nations, considered that this principle would operate to exclude them from fishing areas already under conservation management. The principle of abstention has been written into Article IV of the 1952 Treaty between the United States, Japan and Canada for the conservation of fisheries of the North Pacific,[21] and perhaps this is one area of the law of the sea in which chances of international agreement are better through limited regional agreements which are adapted to the special conditions of a particular fishing zone and a particular stock of fish. Negotiations with other states on measures of conservation pursuant to the provisions of this Convention would also give the United States an additional opportunity to press for recognition of the abstention principle.

IV. THE CONTINENTAL SHELF

The legal problems of the continental shelf have had a short history. In 1945 President Truman issued a proclamation asserting United States jurisdiction and control over "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States."[22] Since then some twenty other states and the United Kingdom, with respect to a dozen of its territories, have asserted rights over their continental shelves.

This sudden interest was principally due to the recent development of engineering techniques for reaching the oil strata which are thought to exist in the continental shelf. Writers on international law have shared in the current interest in the continental shelf, although until now there has been no general agreement among them on whether the rights of a state in the continental shelf are recognized under existing international law. The present Convention, if duly ratified, would remove any doubts on this point. It confers on the coastal state sovereign rights over the continental shelf

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[19] 7 L.C. Report, p. 38.

[20] Van Cleve, R., *The Economic and Scientific Basis of the Principle of Abstention*, U.N. General Assembly, 4/Conf. 13/3, 4 October 1957.

[21] *International Convention for the High Seas Fisheries of the North Pacific Ocean*, Treaties and other International Acts Series No. 2786, May 9, 1952.

[22] Presidential Proclamation No. 2667, Sept. 28, 1945, 59 Stat. 884.

"for the purpose of exploring it and exploiting its natural resources." (Art. 2).

The continental shelf over which these sovereign rights are granted is defined in Article 1 as referring:

> "To the sea bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 100 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; to the sea bed and subsoil of similar submarine areas adjacent to the coasts of islands."

There was considerable debate at the Conference and in the International Law Commission whether to adopt a definition of the shelf based on the depth of the water above it or one based on the technical means of exploitability. Finally, the two criteria were combined as depth alone seemed too rigid and exploitability alone too vague.[23] The Convention does not determine whether in the United States the rights over the continental shelf belong to the Federal Government or to a coastal state of the United States. This, of course, is a matter of United States internal law and not of international law.

The definition of "the natural resources" of the continental shelf which the coastal state can explore and exploit also gave rise to some controversy. While there was general agreement that "natural resources" should include mineral resources, the issue was whether they should also include mobile living organisms, like shrimp, as proposed by Mexico, and sedentary species attached to the sea bed, like pearl oysters, as proposed by Australia. As finally adopted the definition included the Australian but not the Mexican proposal. (Art. 2, paragraph 4). Hence, according to this definition, Australia would have the right to exclude other nations from fishing for pearl oysters on its continental shelf, whereas Mexico would not have the right to exclude other nations from fishing for shrimp on its continental shelf.[24]

The rights of a coastal state over the continental shelf do not modify the legal status of the superjacent waters as high seas. However, in the course of exploration and exploitation, a coastal state is not precluded from interfering with navigation, fishing or the conservation of the living resources of the sea if the work does not result in 'unjustifiable interference." (Art. 5(1)). The International Law Commission noted that in some instances interference with fishing and navigation might be justified, even though substantial, and that on the other hand, even insignificant interference would be unjustified if unrelated to "reasonably conceived requirements of exploration."[25] The coastal state may also maintain necessary installations and devices on the continental shelf and establish safety zones around them for a distance

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[23] Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 American Journal of International Law 629, at 633–634. (October 1958).

[24] Id. at *op. cit. supra*, 638–640.

[25] Report of the International Law Commission, *op. cit. supra* at 4.

of 500 metres. These safety zones must be respected by ships. No such installations or devices may be established, however, where interference may be caused in the use of recognized sea lanes essential to international navigation. (Art. 5(3) and (6)). These rules attempt to strike a reasonable balance between the interests of the coastal state in exploration and exploitation of the continental shelf and the freedom of the seas.[26]

Strong opposition developed at the Conference to the inclusion of a "disputes" provision in the Convention on the continental shelf such as had been drafted by the International Law Commission.[27] The International Law Commission draft which had the support of the United States provided for compulsory submission to the International Court of Justice of disputes relating to the continental shelf unless the parties agreed to another method of peaceful settlement. Instead, on Swiss initiative, the Conference adopted an "Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes" applicable to any of the four Conventions, other than the provisions with separate arbitration machinery in the Convention on Fishing and Conservation of the Living Resources of the High Seas. This Protocol was adopted without dissenting votes by 52 votes with 13 abstentions. It states that disputes arising out of the interpretation or application of any of the four Conventions, with the exception already mentioned, shall lie within the compulsory jurisdiction of the International Court of Justice and may be brought before the Court by any party to the Protocol. The Protocol also provides that instead of resorting to the Court, the parties may agree on arbitration or conciliation. (Arts. 2 and 3).

CONCLUSION

The Geneva Conventions on the Law of the Sea provide further evidence that international agreement on important aspects of international law is not only desirable but possible. The success of the Conference may pave the way for the gradual codification and development of other areas of international law. Thus, the Conventions are a significant contribution to the strengthening of the rule of law among nations.

With respect to the law of the sea, the Conventions have accomplished much in clarifying existing rules of customary international law and in developing new rules. To a remarkable extent they agree with international law and practice as interpreted and recognized by the United States. In particular, the Conventions on the Continental Shelf and on Fishing and Conservation of the Living Resources of the High Seas closely parallel the policies embodied in the two Truman Proclamations of 1945. It should also be noted that no vital interests of the United States are threatened or jeopardized by these Conventions.

It is true that the United States did not win the agreement of the Con-

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[26] Campbell, N. *International Law Developments Concerning National Claims to and in Offshore Areas,* 33 Tulane Law Review 339 (June 1959).

[27] Whiteman, *op. cit. supra* at 655.

ference on its views with respect to the breadth of the territorial sea, the nationality of ships and the principle of abstention in fishing. This, however, should not be taken as grounds for disapproval of the Conventions in view of the high degree of agreement with previously held positions of the United States which was achieved.

The Conventions are a forward step in international law and should be ratified. It is also desirable that the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes be ratified as it would undoubtedly strengthen the ultimate effectiveness of the Conventions.

The Committee on International Law of The Association of the Bar of the City of New York recommends that the United States Senate give its advice and consent to the ratification of the 1958 Geneva Conventions on the Law of the Sea and the Optional Protocal of Signature Concerning the Compulsory Settlement of Disputes.

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A REVIEW*

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Two prominent authorities and practitioners in the field of foreign law, Otto C. Sommerich, former chairman of this Association's Committee on Foreign Law and present president of the American Foreign Law Association, and Benjamin Busch, Chairman on Comparative Procedure and Practice of the Section of International and Comparative Law of the American Bar Association, have combined their extensive experience and talents to produce this excellent guide. Equally helpful to the practitioner as well as to the scholar and student, it not only states what the law is (in those areas where statutory and decisional law are available) but it reflects the author's points of view as to what it should be.

It is probable that except in the metropolitan centers, it is the general practitioner who must delve into the intricacies of foreign law in its impact upon the domestic law suit. Not only in matters involving the administration of estates but also in commercial litigation do we find these problems of foreign law arising.

Since it appears that the decisional law on the subject has most frequently emanated from the courts of New York, the case law cited is mainly that from this jurisdiction. The Guide, nevertheless, remains of inestimable value to practitioners throughout the country.

While the volume contains less than 200 pages, including some valuable appendices of relevant statutory material and basic opinions together with author, case and subject indices, the authors have thoroughly covered such diverse topics as: "When Foreign Law is Applied—Choice of Laws," "Common Law Requirements," "The Development of the Judicial Notice," "Proof of Foreign Law," "Presumptions," "Summary Judgment," and "How Foreign Law is Applied in Other Countries." In the last chapter mentioned, the comparative point of view is set forth by a summary of how foreign law is ascertained and proved in England, Austria, Switzerland, France and Germany—material (except for England) not too readily available in English.

A central thesis of the work is that even though a court may take judicial notice of foreign law (see, e.g., C.P.A. section 344-a), such law should be

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* Sommerich, Otto C. and Busch, Benjamin. Foreign Law, A Guide to Pleading and Proof. New York, Published by Oceana Publications for the Parker School of Foreign and Comparative Law. 1959.

pleaded and proof submitted in the traditional manner. The authors prefer the ascertainment of the foreign law through the introduction of expert testimony in an adversary manner rather than through the court's own independent research even when permissible.

The literature in this branch of the law has been greatly enriched by the addition of this practical work.

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RECENT ACQUISITIONS

Alexandrowicz, C. H. A bibliography of Indian law. Madras, Oxford Univ. Press. 1958. 69p.

Al-Shawi, Khalid A. The role of the corporate entity in international law. Ann Arbor, Overbeck. 1957. 133p.

American Law Institute. Restatement of the law, second: trust 2d, as adopted by the ALI at Washington, D.C., May 23, 1957. St. Paul. 1959. 3v.

American Management Association, Inc. Finance Division. Corporate mergers and acquisitions; basic financial, legal and policy aspects. New York. 1958. 178p. (AMA management rep. no. 4).

Andrews, Frank Emerson. Legal instruments of foundations. New York, Russell Sage Foundation. 1958. 318p.

Anson, William Reynell (Sir). Principles of the English law of contract and of agency in its relation to contract. 21st ed. by A. G. Guest. Oxford, Clarendon Press. 1959. 607p.

Astle, W. E. Air carriers' cargo liabilities and immunities. London, Whiterby. 1958. 101p. (Valiant series).

Austin, Cyrus. Price discrimination and related problems under the Robinson-Patman act. 2d rev. ed. Philadelphia, Joint Com. on Continuing Legal Education. 1959. 178p.

Barry, John V. An introduction to the criminal law in Australia. London, Macmillan. 1948. 128p. (Cambridge, Dept. of Criminal Science. English studies in criminal science, no. 6).

Beth, Loren P. The American theory of church and state. Gainesville, Univ. of Florida Press. 1958. 183p.

Bok, Curtis. Star Wormwood. 1st ed. New York, Knopf. 1959. 228p.

Boorstein, Daniel J. The mysterious science of the law. Boston, Beacon. 1958. 257p. (1st Beacon paperback ed.).

The British Commonwealth, 1958. 2d ed. London, Europa. 1958. 958p.

Carroll, Holbert N. The house of representatives and foreign affairs. Pittsburgh, Univ. of Pittsburgh. 1958. 365p.

Charlesworth, John. Charlesworth on negligence. 3d ed. London, Sweet & Maxwell. 1956. 672p. (The common law library, no. 6).

Choka, Allen D. Buying, selling and merging businesses. Dec. 1958. Philadelphia, Joint Com. on Continuing Legal Education. 1958. 178p.

Clad, Clinton C. Family law. Dec. 1958. Philadelphia, Joint Com. on Continuing Legal Education. 1958. 234p.

Clark, Ralph Ewing. A treatise on the law and practice of receivers. 3d ed. Cincinnati, W. H. Anderson. 1959. 4v.

Cohen, Boaz. Law and tradition in Judaism. New York, Jewish Theological Seminary of America. 1959. 243p.

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Cooper, Frank E. Living the law. Indianapolis, Bobbs-Merrill. 1958. 184p.

Corbett, Percy Ellwood. Law in diplomacy. Princeton Univ. Press. 1959. 290p.

Corwin, Edward Samuel. The constitution and what it means today. 12th ed. Princeton Univ. Press. 1958. 344p.

Corwin, Edward Samuel. Court over constitution, a study of judicial review as an instrument of popular government. Gloucester, Mass., Peter Smith. 1957. 272p.

Corwin, Edward Samuel. Understanding the constitution. Rev. ed. New York, Dryden. 1958. 228p.

Countryman, Vern. Douglas of the supreme court; a selection of his opinions. Garden City, Doubleday. 1959. 401p.

Curtis, Charles P. The modern prudent investor. Nov. 1958. Philadelphia, Joint Com. on Continuing Legal Education. 1958. 142p.

Debevec, Robert M. Law and the sportsman. New York, Oceana. 1959. 112p.

The dictionary of English law. Gen. ed., Earl Jowitt. London, Sweet & Maxwell. 1959. 1905p.

Dimock, Marshall Edward. Public administration. Rev. ed. New York, Rinehart. 1958. 573p.

Dove, Emil. Derecho international privado. Barcelona, Bosch. 1947. 242p. (Los grandes problemas del derecho international, v. 1).

Ehrenberg, Richard. Capital and finance in the age of the renaissance; a study of the Fuggers and their connections. New York, Harcourt, Brace. 1928. 390p. (Bedford series of economic handbooks, no. 2).

Ehrenzwieg, Albert Armin. Conflict of laws. Pt. 1, jurisdiction and judgments. St. Paul, West. 1959. 367p.

Fenno, Richard F. The president's cabinet; an analysis in the period from Wilson to Eisenhower. Cambridge, Harvard Univ. Press. 1959. 327p.

Fisch, Edith L. Fisch on New York evidence. Pomona, New York. 1959. 678p.

Forman, Howard I. Patents; their ownship and administration by the United States government. New York, Central Book. 1957. 354p.

France. Laws, statutes, etc. Code administratif; avec le concours de M. Jean Rondepierre. 5th ed. Paris, Juris. Générale Dalloz. 1958. 969p. (Petits codes Dalloz).

France. Laws, statutes, etc. Code administratif; supplément pour mise a jour de l'edition 1959. Paris, Librairie Dalloz. 1959. 118p.

Friedmann, Wolfgang G., ed. Legal aspects of foreign investment. Boston, Little, Brown. 1959. 812p. (Columbia Univ. international legal studies program).

Friedrich, Carl Joachim. The philosophy of law in historical perspective. Chicago, Univ. of Chicago Press. 1958. 253p.

Galston, Clarence G. Behind the judicial curtain. Chicago, Barrington House. 1959. 159p. "First edition."

Garland, Paul Griffith. American-Brazilian private international law. New York, Oceana. 1959. 125p.

Great Britain. Board of Inland Revenue. Income taxes in the commonwealth. London, H. M. Stationery Off. 1958. (loose-leaf).

Guide to the diplomatic archives of western Europe. Edited by Daniel H. Thomas and Lynn M. Case. Philadelphia, Univ. of Pennsylvania Press. 1959. 389p.

Haar, Charles Monroe. Land-use planning; a casebook on the use, misuse and reuse of urban land. Boston, Little, Brown. 1959. 790p. (Law school casebook series).

Harno, Albert J. Letters to the law alumni of the Univ. of Illinois 1930–1957. Chicago, Burdette Smith. 1958. 172p.

Harris, Homer I. Handling federal estate and gift taxes: law, practice, procedure. Mount Kisco, Baker, Voorhis. 1959. 1216p.

Harrison, Wilson R. Suspect documents; their scientific examination. London, Sweet & Maxwell. 1958. 583p.

Hollander, Barnett. The international law of art, for lawyers, collectors and artists. London, Bowes & Bowes. 1959. 387p.

Hoyt, Edwin C. The unanimity rule in the revision of treaties; a re-examination. The Hague, Nijhoff. 1959. 264p.

Indiana State Bar Association. The twelfth annual eleventh district institute on capital gain v. ordinary income. Indianapolis, Bobbs-Merrill. 1958. 374p.

Institute of the Law-Medicine Center, Western Reserve University. Sept. 1956. The head: a law-medicine problem. Cleveland, Multi-Stat Copy Co. 1957. 431p.

The heart: a law-medicine problem. 1958. 334p.

Instituto Uruguayo de Derecho International. Uruguay and the United Nations. New York, Manhattan Pub. 1958. 129p. (National studies on international organization).

Jamaica. Laws, statutes, etc. The laws of Jamaica in force on the 1st day of June 1953. Rev. ed. Kingston, Govt. Printer. 1953. 9v. Supplement, June 1953–June 1955. Kingston. 1955. 1v.

Kemp, Arthur. The legal qualities of money. New York, Pageant. 1956 181p.

Kolle, Thor W. Modern banking forms. Boston, Banking Law Journal. 1958. 1v. (loose-leaf).

Laurent, Francis W. The business of a trial court, 100 years of cases. Madison, Univ. of Wisconsin Press. 1959. 314p.

Levy, Newman. The Nan Patterson case. New York, Simon & Schuster. 1959. 245p.

Low, Elmer. How to prepare and try a negligence case. Englewood Cliffs, Prentice-Hall. 1957. 244p.

Mackay, Richard Vance. Law of marriage and divorce simplified. 2d ed. by Irving Mandell. 3d ed. rev. by Oceana editorial staff. New York, Oceana. 1959. 96p. (Legal almanac series no. 1.).

Manoff, Marcus. Labor relations law. Dec. 1958. Philadelphia, Joint Com. on Continuing Legal Education. 1959. 147p.

Mason, Lwell. The language of dissent. New York, World Publishing. 1959. 314p.

Mendelson, Wallace, ed. The constitution and the supreme court. New York, Dodd, Mead. 1959. 520p.

Molloy, Robert T. Federal income taxation of corporations. Mar. 1959. Philadelphia, Joint Com. on Continuing Legal Education. 1959. 162p.

Morris, Clarence. The great legal philosophers; selected readings in jurisprudence. Philadelphia, Univ. of Pennsylvania Press. 1959. 571p.

Moskowitz, Moses. Human rights and world order; the struggle for human rights in the United Nations. New York, Oceana. 1958. 239p.

Nathan, Harry Louis. Medical negligence; being the law of negligence in relation to the medical profession and hospitals. London, Butterworth. 1957. 218p.

Newport, Cecil Archer. Income tax and practice. 28th ed. London, Sweet & Maxwell. 1958. 464p.

Ogilvie, Charles (Sir). The King's government and the common law, 1471–1641. Oxford, Blackwell. 1958. 176p.

Oklahoma Institute on Taxation. Operational effects of the I.R.C. amendments. Albany, Banks. 1958. 203p. Mimeographed.

Palmer, Francis Beaufort (Sir). Palmer's company law. 20th ed. London, Stevens. 1959. 1258p. Appendix: pp. 829–1258.

Pan American Union. Legal Division. Mining and petroleum legislation in Latin America. Washington, D. C. 1958. 169p.

Parry, David Hughes. The sanctity of contracts in English law. London, Stevens. 1959. 77p. (Hamlyn lecture series 10).

Patterson, Robert T. The tax exemption of cooperatives. Claremont, Cal., Claremont Men's College. 1958. 206p.

Paul, Julius. The legal realism of Jerome N. Frank; a study of fact-skepticism and the judicial process. The Hague, Nijhoff. 1959. 177p.

Pound, Roscoe. Jurisprudence. St. Paul, West. 1959. 5v.

Reuter, Paul. International institutions. New York, Rinehart. 1958. 316p. (Minerva series of student handbooks).

Robertson, A. H. European institutions: cooperation, intergration, unification. New York, Praeger. 1959. 372p. (The library of world affairs, no. 44).

Ross, Alf. On law and justice. Berkeley, Univ. of California Press. 1959. 383p.

Sangret, August, defendant. The trial of August Sangret. Ed., Macdonald Critchley. London, W. Hodge. 1959. 233p.

Schereschewsky, Benzion. Family law in Israel. Jerusalem, Rubin Mass. 1958. 412p. (T.p. and text in Hebrew).

Schwartz, Bernard. The professor and the commissions. 1st ed. New York, Knopf. 1959. 275p.

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Silverberg, Louis G. How to take a case before the National Labor Relations Board. Rev. ed. Washington, BNA. 1959. 386p.

Simpson, John Liddle. International arbitration: law and practice. Pub. under the auspices of the David Davies Memorial Institute of Int'l. Studies. New York, Praeger. 1959. 330p.

Sommerich, Ott C. Foreign law; a guide to pleading and proof. New York, Oceana. 1959. 170p.

Spratt, James L. Military trial techniques. Dallas, American Guild Press. 1957. 322p.

South Dakota Law Review. v. 1–. Spring 1956–. Vermillion, School of Law of South Dakota Univ. Annual.

Speiser, Stuart M. Preparation manual for aviation negligence cases. New York, Federal Legal Pub. 1958. 1001p.

Thomas, Eliot B. Federal securities act handbook. Jan. 1959. Philadelphia, Joint Com. on Continuing Legal Education. 1959. 181p.

Tresolini, Rocco J. American constitutional law. New York, Macmillan. 1959. 673p.

The United Nations ten years' legal progress; a collection of essays. Les Nations Unies; quelques problèmes juridiques. The Hague, Nederlandse Studentenvereniging voor Wereldrechtsorde. 1956. 192p.

Vaccari, Oreste. Concise English-Japanese, Japanese-English dictionary. 1st ed. Tokyo, Vaccari Language Inst. 1958. 449p.

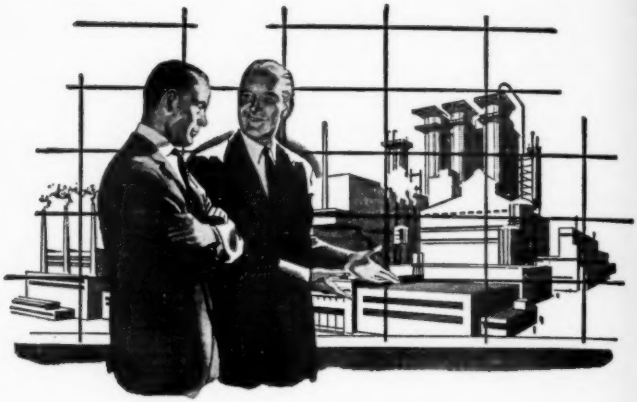
Van Riper, Paul P. History of the United States civil service. Evanston, Ill., Row, Peterson. 1958. 558p.

Varallanos, José. El derecho indiano a través de nueva crónia y su influencia en la vida social peruana. Lima, Suma. 1946. 184p.

Washington Foreign Law Society. Essays on French law. Pub. in cooperation with the George Washington Univ. law school. Washington, D. C. 1958. 96p.

Wortley, B. A. Expropriations in public international law. Cambridge, Univ. Press. 1959. 169p. (Cambridge studies in international and comparative law, no. 6).

Young, Tien-Cheng. International civil service: principles and problems. Brussels, Int'l. Inst. of Administrative Sciences. 1958. 268p.



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